United Nations A/CN.4/669

General Assembly

Distr.: General
21 March 2014
English
Original: English/French/Spanish

International Law Commission
Sixty-sixth session
Geneva, 5 May-6 June and 7 July-8 August 2014

Expulsion of aliens

Comments and observations received from Governments

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I. Introduction

1. At its sixty-fourth session (2012), the International Law Commission adopted, on first reading, the draft articles on the expulsion of aliens. Moreover, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.[1] The Secretary-General circulated a note dated 18 October 2012 transmitting the draft articles with commentaries thereto to Governments, as well as a reminder note dated 22 April 2013. In paragraph 6 of its resolution 67/92 of 14 December 2012, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles and commentaries thereto.

2. As at 20 March 2014, written replies had been received from Australia (21 January 2014), Austria (13 January 2014), Belgium (17 December 2013), Canada (8 January 2014), Cuba (7 March 2014), the Czech Republic (31 December 2014), El Salvador (20 December 2013), Germany (30 December 2013), Morocco (8 January 2014), the Netherlands (20 January 2014), the Republic of Korea (20 January 2014), the United Kingdom of Great Britain and Northern Ireland (8 January 2014) and the United States of America (7 March 2014). The comments and observations received from those Governments are reproduced in section II below, organized thematically, starting with general comments and continuing with comments on specific draft articles.

II. Comments and observations received from Governments

A. General comments

Australia

[Original: English]

To the extent that the draft articles are declarative of existing rules of international law in respect of the expulsion of aliens, Australia considers that the work of the International Law Commission in consolidating the international law in this area will usefully serve as a guide for States in implementing international obligations as well as for the development of domestic law and policies.

For its part, Australia is committed to providing a legal system that is predictable, transparent and respectful of human rights and dignity in its treatment of aliens. Australia commends the inclusion of draft articles that reflect these principles. In this regard, we welcome in particular draft article 14, paragraph 1, on the treatment of aliens with humanity and with respect for human dignity, and draft article 21, paragraph 1, which promotes the voluntary departure of aliens subject to expulsion.

In some respects, however, Australia considers that the draft articles advance new principles that do not reflect the current state of international law or the practice of States.

[1] See A/67/10, paras. 41-45.

Accordingly, Australia would suggest that the International Law Commission exercise restraint in conflating existing principles and expanding established concepts in new directions. In circumstances where the draft articles draw on existing provisions in other treaties, we recommend the Commission reflect as precisely as possible previously agreed language.

Canada

[Original: English]

The legal status and purpose of the draft articles merits clarification. Given existing and inconsistent State practice, precedent and doctrine in this area, Canada does not view the draft articles as either a progressive development or a formulation and systematization of rules of international law. Canada encourages the International Law Commission to include a clear statement at the beginning of the draft articles that the articles neither codify existing international law nor reinterpret long-standing and well-understood treaties.

Several references are made to obligations under "general international law". These references should clarify whether this term includes customary international law and treaty law.

Several references to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live appear in the commentary to these draft articles (see A/67/10, para. 46). Canada objects to any suggestion that this Declaration represents customary international law.

Cuba

[Original: Spanish]

The Republic of Cuba wishes to reiterate the usefulness of codifying the human rights of persons who have been or are being expelled, provided that such codification is guided by the principle of comprehensive protection of the human rights of the person who has been or is being expelled, and does not infringe on the sovereignty of States.

Broadly speaking, Cuba recommends including an article that provides for the State of destination to be notified before an expulsion is carried out. In this regard, Cuba considers it appropriate to include in the draft articles a reference to the right of persons who have been or are being expelled to communicate with representatives of the relevant consulate.

Protection of the human rights of persons who have been or are being expelled cannot constitute a limit on the exercise of the right of a State to carry out expulsions.

Cuban criminal law provides for the expulsion of aliens as one of the additional sanctions that the sanctioning tribunal can impose on individuals, in accordance with article 28.3 (i) of Act No. 62 of 30 April 1988, the Criminal Code of the Republic of Cuba. Article 46.1 of the Code provides that the punishment of expulsion may be applied to an alien when a competent tribunal finds that the nature of the offence, the circumstances of its commission, or the personal character of the defendant indicate that his or her continued presence in the Republic would be harmful. It further provides that the expulsion of aliens may be imposed as an additional measure once the principal sanction has been completed and grants the

Ministry of Justice the discretion of ordering the expulsion of the sanctioned alien prior to the completion of the primary sanction, in which case the criminal culpability of the guilty person is annulled.

El Salvador

[Original: Spanish]

With regard to the terminology used, El Salvador recommends that the terms "lawful/unlawful" be replaced by "regular/irregular immigration status", to reflect the progress achieved by international human rights law. There is now no question that all persons — irrespective of nationality, race, religion or any other status — are free and equal in dignity and rights, which implies that there are no "unlawful" individuals but rather persons whose immigration status may become regular or irregular in accordance with the domestic law of each State.

Similarly, the term "alien" should be changed to "alien persons" in all the draft articles in order to achieve consistency in the use of inclusive language. That, for example, was the language used in the Convention on the Rights of Persons with Disabilities, in which "persons with disabilities" was the preferred term.

As for substantive additions to the draft, the Republic of El Salvador deems it appropriate to incorporate an express provision on the right to health of detained persons subject to expulsion. The right to health has been widely recognized as an inalienable right of every person, which guarantees the enjoyment of the highest attainable standard of physical, mental and social well-being.

The right to health acquires a special connotation in the context of detention since, owing to the restrictions on mobility intrinsic in such a measure, individual efforts to attain such well-being are either out of the realm of possibility or fraught with complexity. It is therefore essential in such cases that the State fulfil its obligation to respect and guarantee the right to health, deriving from its obligations under international law.

In order to fulfil that requirement, it is not sufficient for State actors to refrain from violating a detained person's right to health; what is called for instead is a proactive approach to ensuring that person's full well-being through the adoption of various types of measures.

Equally important are special measures for the purpose of meeting the particular health needs of persons deprived of liberty who belong to vulnerable or high-risk groups, including older persons; women; boys and girls; persons with disabilities; persons with HIV/AIDS or tuberculosis; persons with a terminal illness who require specialized medical treatment; and women deprived of liberty who are in need of reproductive health care.

In view of the foregoing, and since mere negligence by the State would per se result in a serious violation of the right to health, this right should be incorporated in the draft articles with the wide scope currently accorded to the right to health.

Lastly, in the context of the principle of non-refoulement, El Salvador recommends the addition of an express provision on the prohibition of expulsion of persons granted asylum or asylum-seekers to territories in which their life, integrity or personal freedom is at risk, since — as will be discussed below — this principle

has transcended the sphere of refugee status to become part of the general corpus of human rights principles.

The foregoing is also necessary in view of the confusing terminology that many countries use to define "asylum" and "refugee". As a result, drafting an express provision would serve to ensure that protection is not denied to persons who, having been persecuted in their States of origin, might not be identified as refugees solely because of terminology issues.

Netherlands

[Original: English]

The commentary on the draft articles (see A/67/10, para. 46) shows that consideration has been given to current State practice. In some cases, the International Law Commission concludes that practice varies from State to State and regards this as a reason not to include a provision on the matter in question. In other cases, the Commission concludes that, although there is insufficient State practice to warrant referring to an existing rule of international law, a provision should nevertheless be included for the progressive development of international law. The Kingdom would urge that this approach be reconsidered. We believe that there is no scope for progressive development of international law in this area, precisely because so much of the law in this area has already been codified and because of the politically sensitive nature of this subject in many countries.

Republic of Korea

[Original: English]

With respect to State sovereignty and human rights of aliens, the draft articles highly respect the human rights of aliens and seek the balance between State sovereignty and the human rights of aliens subject to expulsion. However, some articles limit State sovereignty to an unreasonable extent.

With respect to the principles of international law, domestic law and international practices, it is noteworthy that the present draft articles include progressive provisions for the gradual development of international law, reflecting the decisions or opinions of local courts on human rights. However, some articles seem to go beyond the purview of multilateral treaties, general principles of international law, domestic law and international practices in their operation. For instance, draft article 6 (Prohibition of the expulsion of refugees), article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), and article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment) were drafted based on the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Notwithstanding, the draft articles expand the range of persons covered, while reducing the grounds for limitation, thus practically exceeding the scope of application of the above-mentioned conventions.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The issue of expulsion of aliens is mainly governed by national laws, subject to respect for a limited number of relevant rules of international law. The latter derive from a number of disparate sources, and different States will have different international obligations concerning the expulsion of aliens in accordance with the relevant multilateral agreements to which they are party. The United Kingdom considers the management and control of immigration across its borders should be a matter for individual States. There is a need to balance wider international obligations with the primacy of the State and the protection of its domestic population. States should and must act in the national interest. The United Kingdom, therefore, does not consider that international law on this topic is sufficiently developed and coherent for it to be codified by the International Law Commission. Moreover, in the light of the numerous political and legal sensitivities and difficulties which surround these issues, this is an area in which the Commission should be cautious about making suggestions for the progressive development of the law.

United States of America

[Original: English]

The United States has a number of general concerns with the draft articles. First, these draft articles do not seek merely to codify existing law, but instead are an effort by the Commission to progressively develop international law on several significant issues. Key aspects of the draft articles, such as their expansion of non-refoulement protections, deviate significantly from the provisions of widely adhered to human rights treaties and from national laws and jurisprudence. While there are a few instances in which the commentary recognizes that aspects of the draft articles reflect progressive development, these are insufficient and leave the incorrect impression that all the other provisions within the draft articles reflect codification. The draft articles even risk generating confusion with respect to existing rules of law by combining in the same provision elements from existing rules with elements that reflect proposals for progressive development of the law.

Second, although there are elements within these draft articles to which the United States would not object, or might even support, we do not believe that, viewed as whole, they currently strike a proper balance in dealing with the competing interests in this field, especially to the extent they advocate certain protections for individuals that unduly restrain States' prerogative and responsibility to control admission to and unlawful presence in their territories.

Third, we remain sceptical of the wisdom and utility of seeking to augment in this manner well-settled, universal rules of law that exist in broadly ratified human rights conventions. Those existing conventions, including the various conventions containing non-refoulement provisions, already provide the legal basis for achieving key objectives of these draft articles. Problems of mistreatment of persons in this area largely arise not from the lack of legal instruments, but the failure to abide by those instruments, a problem that these draft articles do not and cannot solve.

B. Final form of the draft articles

Australia

[Original: English]

Australia notes that there is a significant existing body of international law on the expulsion of aliens, which will continue to grow as movement across borders becomes ever more commonplace. The international law in this area is also complemented by a broad range of domestic legal and policy decisions which more properly fall within the sovereign regulation of States. Accordingly, Australia considers that the work of the International Law Commission will be most valuable where it assists States to implement their obligations. Australia therefore suggests that the draft articles would be most appropriate as a set of principles or guidelines representing international best practice, rather than as any sort of binding instrument. In this manner, the work of the Commission will usefully contribute to the consolidation of laws and practices in this area.

Czech Republic

[Original: English]

The Czech Republic would prefer that these draft articles be accepted as legally non-binding guidelines.

Germany

[Original: English]

The final outcome of this topic is of utmost importance to us. Germany continues to agree with those members of the International Law Commission who have repeatedly expressed doubts as to whether this topic may be suitable for incorporation into a convention. This topic is not one for developing rules *de lege ferenda*. It is governed by a large number of national rules and regulations. As regards international law, human rights instruments address the subject and contain relevant guarantees for the protection of the individual in case of expulsion. We do not see a need for further codification. Instead, we support the idea of drawing up draft guidelines or principles enunciating best practices. The current draft articles seem to support this approach as they contain a number of best practices rather than only currently existing legal obligations.

Netherlands

[Original: English]

The Kingdom would like to reiterate its concern that the International Law Commission should not design a new human rights instrument; these draft articles should reflect accepted principles of international law and the detail and nuance of these principles. We support the reformulation of these articles into "best practices" or "policy guidelines". However, we oppose their codification into a treaty.

Republic of Korea

[Original: English]

While a State should respect the basic principles of human rights in the decision of expulsion, it can also exercise its discretion in the relevant determination, taking into account its national interests and policies. In this sense, rather than codifying the draft articles into treaties, it would make better sense to adopt the final outcome in the form of a declaration of general principles or a framework convention.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom does not believe that the outcome of the work of the Commission on this topic should be presented in the form of draft articles, but rather should at the most take the form of guidance to States, albeit in an altered form. Guidance has a potential role to play in setting out the high-level principles for how States should respond and act in terms of the expulsion of migrants within the context of established international law (to which they are party) but must allow for domestic primacy, reflecting the disparate approaches and unique challenges individual States face.

United States of America

[Original: English]

The United States does not believe that this project should ultimately take the form of draft articles. Given that several multilateral treaties already exist in this field, we question how much support would exist for negotiating a new convention based on these draft articles. Therefore, we recommend the Commission consider converting these draft articles into another more appropriate form, such as principles or guidelines. If these do remain as draft articles, the United States strongly recommends that the commentary include a clear statement at the outset that they substantially reflect proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law.

C. Specific comments on the draft articles

Part one
General provisions

1. Article 1
Scope

Australia

[Original: English]

Australia notes that, as drafted, a number of the draft articles potentially extend existing or create new international law obligations. In this regard, Australia notes the decision of the International Law Commission to address both aliens lawfully and unlawfully present in the territory of the expelling State. While

Australia considers that there is merit in considering both categories of alien in the draft articles, Australia is concerned that this approach at times leads to a mischaracterization of the distinction between these two categories of alien under international law.

Germany

[Original: English]

We would like to reaffirm our conviction that the scope set out in article 1 is too broad. To include both groups of aliens — those who are legally and those who are illegally present in a State's territory — in the general scope of the draft articles and to make a distinction only in a couple of instances does not seem appropriate. The rights accorded to both groups differ too much with regard to expulsion.

Morocco

[Original: French]

Draft article 1 focuses on aliens who are lawfully or unlawfully present in the territory of a State and are subject to expulsion. Nationals are therefore excluded from its scope. The draft articles identify eight cases of prohibited expulsion, including deprivation of nationality for the sole purpose of expulsion. According to draft article 9, "a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her". This provision addresses the specific situation in which the State would deprive a national of his or her nationality for the purpose of expelling him or her.

The Commission was careful to clarify that the issue of the expulsion by a State of its own nationals had not been envisaged when this scenario was included among the cases of prohibited expulsions, because it fell outside the scope of the draft articles. In this regard, Morocco recalls that, just as the act of deprivation of nationality is inherently linked to the status of nationals and is specific to the State, both the act and process of expulsion cannot be considered in isolation from the status of the persons to whom they apply: if nationals, as subjects of expulsion, have been excluded from the scope of the draft articles, why would they be so excluded only from the specific perspective of deprivation of nationality? Although the consequence thereof may be related to the topic under consideration, the inclusion of this scenario creates ambiguity as to the scope *ratione personae* of the draft articles.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom suggests that the text and scope of draft article 1 would benefit from amendment and some clarification. As presently drafted, the scope of article 1 applies to all aliens, whether in the United Kingdom lawfully or unlawfully. The United Kingdom recognizes that all aliens within its territory have a right to respect for their human rights and that States have a responsibility to weigh the interests of the individual and the State by means of fair and balanced processes. Nevertheless, the United Kingdom considers that it is reasonable to apply different approaches and safeguards to those with differing immigration status.

United States of America

[Original: English]

The United States welcomes the inclusion of draft article 1, paragraph 2.

2. Article 2
Use of terms

Austria

[Original: English]

An expulsion can only be effected through a formal governmental act. Therefore, Austria does not agree with the current definition of the term "expulsion" as contained in draft article 2 and subsequently further elaborated in draft article 11. The words "or conduct consisting of an action or omission" have to be removed. It would, in particular, contradict draft article 4, which refers to a decision reached in accordance with the law.

Canada

[Original: English]

Canada would remove "refugee" from the definition of "expulsion" in article 2, subparagraph (a) (Definitions). As drafted, it remains unclear whether "refugee" in this context is meant to apply to "protected persons", "refugee claimants", or others. The definition of "expulsion" in the draft articles needs to be clarified as multiple interpretations are possible with varying potential implications.

Canada wishes to clarify the meaning of "expulsion" in article 2, subparagraph (a), which is defined as, "a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State". Canada understands this definition to thus include expulsion by the State and expulsion attributable to the State in accordance with the principles of State responsibility. Canada wishes to emphasize that the scope of "conduct attributable to a State" should incorporate the same threshold for attribution as described in the draft articles on State Responsibility for Internationally Wrongful Acts.

Cuba

[Original: Spanish]

The Republic of Cuba recommends that draft article 2, paragraph (b), make reference to citizenship rather than nationality, given that citizenship is what links an individual politically and legally to a State. Cuba understands that nationality is an attribute that defines each individual's lifelong peculiarities based on culture, idiosyncrasies and traditions. In this connection, Cuba suggests changing the word "nationality" to "citizenship" throughout the draft articles.

Germany

[Original: English]

In its previous statements, Germany emphasized that the term "expulsion" covers two distinct issues and that the general use of the term in the current International Law Commission reports and debate could lead to misunderstandings. Hence, Germany welcomes the respective clarification in draft article 2, subparagraph (a), according to which the term "expulsion", as it is used in the draft articles, covers only the State's right to expel — that is, to oblige an alien to leave the country, which has to be distinguished from a State's right to deport an alien — that is, to force him or her to leave the country.

However, we would like to reiterate our proposal that the expression "omission" in draft article 2, subparagraph (a) should be specified in order to more narrowly describe its scope of application.

Republic of Korea

[Original: English]

Article 2 regards the non-admission of a refugee as a sort of expulsion, while the Convention relating to the Status of Refugees, a standard treaty for the protection of refugees, does not consider it to be expulsion. The same is true of a domestic law (Refugee Law) of the Republic of Korea.

The draft articles do not specify the scope of "law" and "international law". This may result in an unexpected limitation on State sovereignty. If the draft states "law", it should specify whether it is "international law", "domestic law", or both (article 4, 8, 26). Similarly, if it states "international law", it should be narrowed down to binding rules for the State concerned (article 3, 5, 31). In order to avoid any unnecessary confusion, it is worth considering defining "law" and "international law" in article 2 (Use of terms).

The Convention relating to the Status of Refugees, while providing obligations of a State to protect refugees when they reside in its territory, does not consider non-admission of refugees to be an expulsion. Likewise, the non-admission of refugees is not deemed as an expulsion under the Refugee Law of Korea. In this context, it should be noted that a State has the sovereign power to allow admission of aliens into its territory. Refugees are no exception. They also belong to the category of aliens that are subject to admission by a State.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom considers the text and scope of draft article 2, subparagraph (a) to refer to persons seeking entry from outside of the State and exclude persons who are refused entry at the border. The draft article should more specifically refer to immigration acts of in-country enforcement. As presently drafted, the article refers to all State acts and omissions to compel aliens to leave (including those already recognized as being lawfully present). This, therefore, could be considered to apply to the whole of the immigration system; the United Kingdom system of immigration is premised on tackling illegal immigration. The Government of the United Kingdom works across departments and disciplines,

ensuring illegal migration does not impact negatively on available services and benefits that are more rightly reserved for those legitimately in the country who have made a contribution. As presently constructed, the draft article takes as a starting point that those illegally present in a country need a positive act to be removable. The view of the United Kingdom is that this could potentially extend to a requirement to regularize an illegal migrant's status, i.e. confer on them a legal status, prior to the State being able to take any activity to enforce removal of the individual because failure to so do incentivizes departure.

The United Kingdom suggests the following amendment to the text of the Article:

> "(2) (a) 'expulsion' means a formal decision of a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;"

United States of America

[Original: English]

The United States has significant concerns with the language in draft article 2, subparagraph (a), defining expulsion to include "conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State". This language, as the commentary notes, is directly related to the concept of "disguised expulsion" addressed in draft article 11. Our concerns with the Commission's treatment of "disguised expulsion" are more fully addressed below in our comments to draft article 11. However, we note here that the language of draft article 2, subparagraph (a), is inconsistent with the language of draft article 11 in numerous respects, thus creating ambiguity as to whether it is intended to cover, and thereby prohibit, an even broader range of conduct.

For example, the text of draft article 11 includes the criterion — underscored in the commentary as the "decisive factor" — that the State must have the "intention of provoking the departure of aliens from its territory" for such actions or omissions to constitute "disguised expulsion". However, draft article 2, subparagraph (a) lacks any such intentionality requirement, which creates ambiguity as to whether draft article 2, subparagraph (a) is intended, or could be read, to cover a wider range of "actions or omissions" as constituting an expulsion. The plain text of article 2, subparagraph (a), might suggest that a State could be held indirectly responsible for certain conduct by private actors who compel an alien to leave the country, regardless of the State's intention. Moreover, as noted below, draft article 2, subparagraph (a), uses the phrase "compelled to leave" whereas draft article 11 speaks of "forcible departure", leaving open whether there is a difference between these two concepts. Consistent with our comments on draft article 11, we believe the words "or conduct consisting of an action or omission, attributable to a State" in draft article 2, subparagraph (a), should be deleted and replaced with "by a State".

In addition, this definition suggests that "expulsion" would include "non-admission" of a refugee. The meaning of the term "non-admission", as used in draft article 2, subparagraph (a), is somewhat unclear and, to our knowledge, that term is not a key operative term in any international legal instrument. In reading the commentary, the Commission appears to be referring to the concept of "return",

which is used in article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), as well as article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In these instruments, "return" has a meaning distinct from expulsion; to wit, the United States Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 182-83 (1993), interpreting article 33 (1) of the Refugee Convention, stated that "'return' means a defensive act of resistance or exclusion at a border ..." Accordingly, it is inapt to suggest that "non-admission" of a refugee would constitute an expulsion. If a refugee is denied admission at a port of entry and removed, that act would constitute a "return" for non-refoulement purposes. See *Sale*, 509 U.S. at 182-83. The United States also understands, based on the phrase "compelled to leave the territory of that State" in draft article 2, subparagraph (a), that these draft articles have no application to any immigration-related procedures conducted outside a State's territory. For these reasons, the United States suggests that the entire phrase "or the non-admission of an alien, other than a refugee" be replaced by "or the return of an alien".

Furthermore, although the non-refoulement obligations in the Refugee Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also separately prohibit the return of an alien entitled to protection, these draft articles deal solely with expulsion. As discussed below in our comments to draft article 6, the United States similarly believes that the reference to "return (*refouler*)" should be deleted from draft article 6, paragraph 3; while draft article 6, paragraph 3, is drawn from article 33 of the Refugee Convention, the reference to "return (*refouler*)" goes beyond the scope of these draft articles.

The United States welcomes in draft article 2, subparagraph (a), the exclusion from "expulsion" of extradition and of surrender to an international criminal court or tribunal.

3. Article 3
Right of expulsion

Canada

[Original: English]

The commentary to article 3 (see A/67/10, para. 46) suggests legal force by stating that, "the right of expulsion is regulated by the present draft articles and by other applicable rules of international law". Canada would replace this statement with, "A State may only expel an alien in accordance with its international legal obligations".

Cuba

[Original: Spanish]

With regard to the right of expulsion set forth in draft article 3, Cuba considers it necessary to refer to respect for domestic law and the maintenance of each State's public security.

Republic of Korea

[See the comment made above under general comments.]

United States of America

[Original: English]

Draft article 3 appears to indicate that States are expected to comply with the purported requirements of these draft articles "and" the requirements of other applicable rules, even if these draft articles are not consistent with existing international treaties. One obvious example of this tension is that these draft articles do not explicitly provide for derogation in times of emergency, whereas many international treaties relating to this topic do provide for such derogation, for example, article 4, paragraph 1, of the International Covenant on Civil and Political Rights. Furthermore, article 13 of the International Covenant states that "An alien lawfully in the territory of a State party (...) shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority (....) " (emphasis added). Draft article 3 leaves unclear whether derogation is permitted, since according to this draft article both sets of rules are applicable.

At the same time, the commentary indicates that derogation is permitted, meaning that the "other applicable rules" supersede these draft articles, at least in that respect. Draft article 8 also addresses this issue, but only in a narrower context. To avoid confusion, draft article 3 should be rewritten, using the language from draft article 8 but in a more comprehensive manner, so as to read:

> "A State has the right to expel an alien from its territory. The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights."

4. Article 4
Requirement for conformity with law

El Salvador

[Original: Spanish]

Draft article 4 is fundamental to the draft articles as a whole, since it requires that any expulsion be carried out within the framework of the law; however, some drafting changes are needed to strengthen its content.

First of all, the heading of the article is unclear in Spanish, as the phrase "obligación de conformidad con la ley" does not indicate what precisely must be in conformity with law. El Salvador therefore suggests indicating clearly that any act carried out during the expulsion process must comply with this requirement.

Secondly, this article must identify the State as the sole entity authorized to take expulsion decisions. As indicated in the Commission's commentary on article 4, the fundamental condition for exercising the expulsion of an alien is the adoption of an expulsion decision by the expelling State in accordance with the law.

It is precisely this requirement which has the effect of prohibiting the State from engaging in conduct that would compel an alien person to leave its territory without formal notification and without any procedures.

In view of the foregoing, El Salvador proposes the following wording:

"Article 4
Requirement [to act] in conformity with law

An alien may be expelled in pursuance of a decision reached [by the State] in accordance with law."

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom reiterates the same concerns with regard to this draft article as are set out above in its comments on draft article 2.

5. Article 5
Grounds for expulsion

Australia

[Original: English]

Australia is concerned that the draft articles do not pay sufficient heed to national security concerns. For example, draft article 5, paragraph 1, could usefully benefit from a national security limitation to the requirement that States provide grounds for any expulsion decision.

Canada

[Original: English]

Canada suggests that article 5, paragraph 3, (Grounds for expulsion) state only: "The grounds for expulsion shall be assessed in good faith and reasonably". Expulsion decisions are based on different processes depending on context (for example, tourist visa, permanent resident application or refugee claimant). Many expulsion decisions are administrative in nature (such as the routine refusal to extend a tourist visa) and quite legitimately would not take into account the gravity of the facts or the conduct of the alien in question.

Regarding the process of expulsion decisions, Canada requests that the commentary to article 5 clarify that the grounds for expulsion be considered at the time of the decision rather than the time of removal.

El Salvador

[Original: Spanish]

As indicated by the International Law Commission, the grounds for expulsion must be expressly provided for by law, but each State is responsible for identifying specific grounds in accordance with its internal law.

In this regard, El Salvador believes that it is not necessary for the draft articles to set out grounds for expulsion, particularly as some of those grounds may not be contemplated in the legislation of certain States, or may have a different scope within the context of expulsion procedures.

Furthermore, it questions the usefulness of identifying national security and public order as grounds for expulsion, as both are indeterminate legal concepts. This difficulty was even recognized by the Special Rapporteur when he wrote:

> "The next challenge is to determine exactly what is covered by the two principal grounds for expulsion, that is, public order and public security. This is all the more difficult in that the threat to public order and public security is assessed by individual States, in this case, expelling States, and that these two concepts are constantly evolving. The two concepts have been incorporated in most legal systems without a specific meaning, much less a determinable content."[2]

In view of the foregoing, El Salvador recommends that paragraphs 1, 3 and 4 of draft article 5 be retained but that the final sentence of paragraph 2 referring to "national security" and "public order" be deleted, thereby establishing only the obligation that the grounds for expulsion must be provided for by law, as follows:

> "[...] 2. A State may only expel an alien on a ground that is provided for by law."

Republic of Korea

[See the comment made above under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom suggests amendment of this draft Article. The concern lies with the specific reference in the article to "national security and public order" and the proximity of the threat, namely, "the current nature of the threat to which the facts give rise". The article as drafted implies limiting the grounds of expulsion which the United Kingdom would be unable to accept. The United Kingdom suggests an amended article which does not fetter the power of authorities, deleting:

> "(2) [....] including, in particular, national security and public order."

Amendment to (3):

> "(3) The ground for expulsion for those otherwise lawfully present shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question."

The United Kingdom is currently legislating to remove the need for standalone removal decisions for illegal migrants. Our position is that illegal migrants should presume that they will be removed unless they make an application to regularize their stay. Under the new process, when an illegal migrant is served with a single

[2] A/CN.4/625, para. 77.

removal and decision to refuse leave to remain, it will state the reason for the refusal and removal, that is, that they are present in the United Kingdom illegally.

United States of America

[Original: English]

The United States understands that draft article 5 permits the expulsion of an alien on any ground that is provided for by law, including the routine removal of a person for violation of United States immigration law.

In draft article 5, paragraph 3, the clauses after the word "circumstances" are unnecessary and somewhat misleading to the extent the proceeding clause already directs that all circumstances be considered. In particular, the clause "the current nature of the threat", even though preceded by "where relevant", might imply that there should be a "threat" of some nature to support a valid ground for expulsion. We recommend ending the sentence after "question" or, alternatively, inserting the words "in particular" after "including" and inserting the words "or other conditions" after "threat" to broaden the applicability of this clause.

In draft article 5, paragraph 4, the words "its obligations under" should be inserted before "international law" to prevent any ambiguity as to the meaning of "contrary to international law". This would be consistent with draft article 25, which appropriately uses the phrase "its obligations under international law".

Part two
Cases of prohibited expulsion

6. Article 6
Prohibition of the expulsion of refugees

Australia

[Original: English]

Australia also notes the draft article 6, paragraph 2, on the prohibition of the expulsion of unlawfully present aliens while their application for refugee status is being considered. This significantly extends the obligations under article 13 of the International Covenant on Civil and Political Rights and article 32 of the Convention relating to the Status of Refugees, which apply only to aliens lawfully in the territory of the State.

Canada

[Original: English]

Article 6, paragraph 2 (Prohibition of the expulsion of refugees), refers to a "refugee ... who has applied for recognition of refugee status". For greater clarity, if the intention of the draft articles is to safeguard against the expulsion of a person whose refugee status determination application is pending, then paragraph (2) should therefore refer to "alien", rather than "refugee".

Canada recommends that article 6 (Refugees), article 23 (Right to life) and article 24 (Prohibition of expulsion to torture) be grouped and reworked to better

reflect existing norms of international law. The prohibition of the expulsion of aliens to torture or cruel or unusual treatment is addressed in article 6, paragraph 3, article 23 and article 24, with an important distinction. Article 6, paragraph 3, allows for expulsion in such circumstances if there are reasonable grounds for regarding the person as a danger to the security of the asylum country or the person is convicted of a serious crime, posing a danger to the community of the asylum country. Conversely, articles 23 and 24 provide an unconditional prohibition against refoulement to torture or cruel or unusual treatment.

Canada agrees with the formulation in article 6, paragraph 3, in respect of the expulsion of refugees absent a risk of death or torture.

Canada notes the comparison between article 5, paragraph 2 (Grounds for expulsion), and article 6, paragraph 1 (Prohibition of the expulsion of refugees). Article 5, paragraph 2, limits the expulsion of aliens to grounds provided by law, including national security and public order. Article 6, paragraph 1, provides national security and public order as the only permissible grounds for expulsion of refugees. Canada would also allow the expulsion of aliens, including individuals recognized as Convention refugees by other countries, who are found to have committed gross or systematic human rights violations, war crimes or crimes against humanity. As the commentary notes, article 6, paragraph 2, is derived not from the Convention relating to the Status of Refugees but from the Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. Canada prefers to see the paragraphs of article 6 remain consistent with the Convention relating to the Status of Refugees, noting that expulsion under draft article 6, paragraph 1, cannot be limited to national security and public order.

Cuba

[Original: Spanish]

Draft article 7 stipulates that a stateless person may only be expelled on grounds of national security or public order, but to ensure that draft article 7 is consistent with draft article 5.2, which relates to aliens, the grounds for expulsion should also include any ground that is provided for under the domestic law of the expelling State.

El Salvador

[Original: Spanish]

It is observed that paragraph 3 of draft article 6 has its equivalent in article 33 of the 1951 Convention relating to the Status of Refugees, which recognizes the prohibition of expulsion and return ("*refouler*"), but which, at the same time, provides for exceptions when the refugee is regarded as a danger to the security of the country or, having been convicted of a particularly serious crime, constitutes a danger to the community.

The Republic of El Salvador is of the view that while this article represented a major stride in the protection of refugees in the twentieth century, the principle of

non-refoulement has continued to evolve and has become a peremptory norm of international law.[3]

The foregoing implies that exceptions to this principle, established 60 years ago, should not be duplicated in a current draft of international scope without taking into consideration the significant progress achieved in this respect and, in particular, the existence of other international instruments which have expanded the protection of refugees.

In the inter-American context, for example, article 22 of the American Convention on Human Rights establishes that "[...]8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment introduces a clear restriction on all types of return ("*refoulement*") by indicating, in its article 3, that "no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

This means that, in cases of torture, there are no exceptions to the prohibition on return ("refoulement"), which is reaffirmed even in cases where a crime has been committed, since the article expressly refers to the concept of extradition without diminishing the protection of the person and without in any way limiting the scope of the principle of non-refoulement.

This has been corroborated by the Special Rapporteur on torture, who has repeatedly recommended to States that "national legislation and practice should reflect the principle enunciated in article 3 of the Convention against Torture, namely the prohibition on the expulsion, return (*refoulement*) or extradition of a person to another State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The principle of non-refoulement must be upheld in all circumstances, irrespective of whether the individual concerned has committed crimes and the seriousness and nature of those crimes".[4]

At the national level, taking into account these international instruments, El Salvador's Act on the Determination of Refugee Status provides, in its article 46, that:

> "Refugees may not be expelled or returned to another country, whether or not it is their country of origin, where their right to life, personal integrity, freedom and safety is at risk of being violated on account of their race or ethnicity, gender, religion or creed, nationality, membership of a certain social group, their political opinions, widespread violence, external aggression,

[3] Cartagena Declaration on Refugees (1984), fifth conclusion: To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.

[4] E/CN.4/2003/68, para. 26 (o).

internal conflicts, large-scale human rights abuses or any other circumstances which may have disturbed the public order.

"In no case shall a refugee be transferred to a third country against his will, even where there has been an expulsion decision by the Commission. In such case, the Commission shall allow a period of one month for his admission to another country to be arranged in coordination with the Office of the United Nations High Commissioner for Refugees (UNHCR)."

In view of the foregoing, the Republic of El Salvador recommends to the International Law Commission that it take into consideration the undeniable evolution of the principle of non-refoulement and its nature as a peremptory norm of international law. It therefore suggests that exceptions to that principle should be deleted from the article, since specifying them in isolation from other human rights treaties could amount to a setback for refugee rights.

Furthermore, if protection under this article applies to both refugees and asylum-seekers irrespective of their immigration status, El Salvador believes it is not necessary to divide the prohibition of expulsion into two paragraphs.

In particular, article 6 as currently drafted is incomplete, as paragraph 1 is about refugees who are in the territory and whose immigration status is regular; while paragraph 2 is about applicants for refugee status whose immigration status is irregular. This would seem to make regular immigration status conditional on the granting of refugee status, which could distort its function. Nor does it cover all the possibilities that arise in practice; for example, there could also be applicants for refugee status whose immigration status is regular.

Lastly, in view of the foregoing, El Salvador wishes to propose the following wording:

"Article 6
Prohibition of the expulsion of refugees

1. The State shall not expel [a person who is a refugee or is applying for refugee status while that person's application is pending] save on grounds of national security or public order.

2. Paragraph 1 shall apply [irrespective of whether the immigration status of the refugee or applicant for refugee status is regular or irregular].

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life, [personal integrity] or freedom would be in danger on account of his or her race, religion, gender, nationality, political or other opinion, membership of a particular group or other social status."

Republic of Korea

[Original: English]

Even though a person can be regarded as a refugee under article 1, subparagraph (a), of the Convention relating to the Status of Refugees, he or she can still be expelled under article 1, paragraph F, (that is, where there are serious reasons for considering that he or she has committed a crime against peace). Such provisions could be incorporated into the present text in the form of a proviso.

A State's obligation in article 6 (1) need not expansively apply to those who have applied for recognition of refugee status on false claims. Article 6 (2) thus could be revised as such:

> "Paragraph 1 shall not apply to any refugee unlawfully present in the territory of the State, who has applied for recognition of refugee status for the sole purpose of refugee application and such application is pending."

[See also the comment made above under general comments.]

United States of America

[Original: English]

Unlike draft article 6, paragraph 1, which restates article 32 (1) of the Convention relating to the Status of Refugees, draft article 6, paragraph 2, has no basis in the Convention, and its exact purpose is difficult to understand as drafted because it applies to a "refugee" whose status as a refugee is still pending. The commentary's explanation of this provision is not satisfactory, as it states that the provision only applies to individuals who actually meet the definition of a "refugee" under international law; however, the provision is premised on the fact that the individual's refugee status is still in question. At the same time, any revision or expansion of this provision would need to account for existing State practice and address concerns about abuse due to manifestly unmeritorious applications. The United States generally stays removal of aliens who have applied for asylum or withholding of removal at least until those claims have been administratively adjudicated; however, there are certain limited exceptions, see, for example, Canada-United States Safe Third Country Agreement. Accordingly, we recommend that this provision be revised to address these concerns or else deleted.

As discussed above in our comments to draft article 2, the United States believes that the words "or return (refouler)" should be deleted from draft article 6, paragraph 3. While draft article 6, paragraph 3, is drawn from article 33 of the Convention relating to the Status of Refugees, the reference to "return" goes beyond the scope of these draft articles, which is otherwise strictly focused on expulsion. There is no clear reason why "return" should be included in this provision but not in draft article 24, given that article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also extends to "returns". We would recommend deleting "return (refouler)" from draft article 6, as well as leaving "return" out of draft article 24.

7. Article 7
Prohibition of the expulsion of stateless persons

Canada

[Original: English]

The definition of "alien" includes stateless persons, according to the commentary to article 2 (Definitions). Article 7 (Prohibition of the expulsion of stateless persons), which distinctly regards stateless persons, is thus unnecessary unless the draft articles advocate separate, additional protection for stateless persons.

Canada has difficulties with article 7 (Prohibition of the expulsion of stateless persons), which limits the grounds for expulsion of lawfully present stateless persons to national security and public order. The use of "lawfully" in this context is odd. Once an individual is subject to an expulsion, they are no longer lawfully in the country; expulsions must be according to law. If "lawfully" is removed, the grounds are too narrow. Canada does not understand its obligations in respect of statelessness to include limitations on the removal of stateless persons that are more limited that those faced by persons with a nationality.

United States of America

[Original: English]

The United States does not regard draft article 7 as reflecting settled law. Draft article 7 is based on article 31 (1) of the 1954 Convention relating to the Status of Stateless Persons. At present, fewer than 80 States are parties to that Convention, and the practice of many non-parties does not conform to article 31 (1). For example, the United States, a non-party, recognizes no such prohibition in United States law. A stateless person who is in violation of United States immigration laws is subject to removal even in the absence of grounds of national security or public order. Such removal may often be impracticable, but the United States may seek to pursue removal of the stateless person to the person's country of last habitual residence or other appropriate country in accordance with United States law.

8. Article 8
Other rules specific to the expulsion of refugees and stateless persons

El Salvador

[Original: Spanish]

Draft article 8 is an extremely useful "without prejudice" clause serving to clarify that the draft articles do not affect the obligatory nature of other rules of international law in this regard.

The Republic of El Salvador nonetheless believes that this clause does not replace the concerns set out above with regard to the principle of non-refoulement of refugees, and the corresponding need for the draft articles to reflect its evolution with the aim of ensuring that States provide adequate protection to this vulnerable group.

Republic of Korea

[See the comment made above under general comments.]

United States of America

[Original: English]

If draft article 3 is modified as the United States recommends above, then this draft article may be deleted. If draft article 3 is not so modified, then draft article 8 should be similarly broadened to read:

"The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights."

9. Article 9
Deprivation of nationality for the sole purpose of expulsion

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Article 9 would benefit from further clarification. The United Kingdom will use deprivation either to address a fraud or to protect the public, albeit that the grounds for deprivation may also be grounds for expulsion in their own right.

The United Kingdom suggests the following amendment to the text of the Article:

"A State shall not make its national an alien, by deprivation of nationality for the sole purpose of expelling him or her, albeit that the grounds for deprivation, prescribed by law, may also be grounds for expulsion in their own right."

United States of America

[Original: English]

The United States understands that draft article 9 is not directed at a situation where an individual voluntarily and intentionally relinquishes his or her nationality, and believes it would be useful to indicate as much in the commentary, perhaps in paragraph 3.

10. Article 10
Prohibition of collective expulsion

Australia

[Original: English]

Australia also notes that other draft articles, such as the prohibition of collective expulsion under article 10, codify rights in universal instruments (the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families) to which Australia is not a party. Given the limited extent of receiving-State support for this Convention, we do not consider that it represents customary international law and would recommend the International Law Commission exercise caution in its codification in the draft articles.

El Salvador

[Original: Spanish]

Paragraph 1 of draft article 10 defines "collective expulsion" as "expulsion of aliens as a group". In this case, it might not be accurate to use a term characterizing aliens as a single group in every situation.

The difficulties that could arise from construing it in this way are obvious, since article 10 must not only prohibi. the expulsion of aliens as a single group but also the arbitrary selection of small groups of alien persons for purposes of expulsion without an individual decision procedure in accordance with law.

As for paragraph 3, it clarifies that members of a group of aliens can be "concomitantly" expelled on the basis of a reasonable and objective examination of the particular case of each individual member of the group. This paragraph is no doubt referring to the provisions of various human rights instruments; however, some drafting changes are necessary to make its content understandable.

Firstly, the term "concomitantly" should be replaced by "simultaneously", which more effectively conveys the idea that the expulsion is taking place at the same time but consists of a number of distinct operations based on separate examinations.

Secondly, although paragraph 3 provides that the examination should be carried out in accordance with the particular situation of each person, more precise language is necessary to indicate that the examination must be individual and must be carried out as part of a process established by law.

Furthermore, paragraph 4 must refer only to the rules applicable in the event of armed conflict. It is particularly problematic to specify "involving the expelling State" as a requirement, since it would also be relevant to identify the other State involved in the conflict. El Salvador therefore suggests using more general language with the aim of ensuring that this paragraph truly functions as a "without prejudice" clause.

In conclusion, it recommends the following wording:

"Article 10
Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means [any act by which a group of alien persons is compelled to leave the territory of a State].

2. The collective expulsion of alien [persons], including migrant workers and members of their families, is prohibited.

3. A State may expel [simultaneously] the members of a group of aliens, provided that the expulsion takes place [in accordance with law and on the basis of individual procedure].

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict."

Germany

[Original: English]

Draft article 10 (2) states the prohibition of collective expulsion of aliens. Taking into account that as a general rule it applies to all aliens regardless of which group they belong to, in our view it is dispensable to mention explicitly one specific group (migrant workers).

Republic of Korea

[Original: English]

The definition of "collective expulsion" in this article may be interpreted to include the expulsion where individuals are expelled as a group even after a reasonable and objective examination of each particular case, solely because they are expelled together with other aliens on board the same aircraft or ship. Such a case should be distinguished from collective expulsion contemplated in article 10. As such, the article could be revised to contain a proviso: "It shall not be deemed as collective expulsion, if a State expels aliens after a reasonable and objective examination of the particular case of each individual alien of the group".

While the purpose of the paragraph 2 is to protect rights of migrant workers and their family, it unduly limits the sovereignty of the territorial State. It should also be noted that, as at January 2014, only 47 countries have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In this context, it would be desirable to delete this paragraph.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom suggests amendments to the text of this article. The United Kingdom fully agrees that mass expulsion should be prohibited, but domestic legislation specifically allows the deportation/removal of family members. The human rights of each person liable to expulsion are considered individually.

The United Kingdom proposes amendment:

"(2) The collective expulsion of aliens, including migrant workers, is prohibited [save in accordance with (3)]."

United States of America

[Original: English]

Although neither draft article 10, nor the commentary (see A/67/10, para. 46), defines the term "group", the United States understands the draft article to refer to a situation where more than one alien is being expelled without an individualized assessment of whether each such alien merits expulsion. As such, so long as each alien within a group receives an individualized assessment, the expulsion may go forward, even if it results in the expulsion of several or a group of aliens at once.

Furthermore, the United States understands that, pursuant to draft article 2, paragraph a, these draft articles do not address a decision by a State not to admit, or deny enter to, aliens of a certain nationality or country of origin.

The United States appreciates that the express identification of "migrant workers and members of their families" in draft article 10 (2) is likely intended to highlight the vulnerability of that particular group. However, given that there are many different kinds of groups that might fall within the scope of these draft articles, all of whom presumably are entitled to the same protection, the United States suggests deleting the words "including migrant workers and members of their families" to avoid any adverse implication for other groups.

The phrase "reasonable and objective examination," while not per se objectionable, introduces a standard that does not appear anywhere else in the draft articles. Given that article 5, paragraph 3, already sets forth similar principles applicable to the examination of any expulsion case, the Commission should consider cross-referencing that draft article, such that the phrase would read

> " ... and on the basis of an examination of the particular case of each individual member of the group consistent with the standards reflected in draft article 5, paragraph 3."

11. Article 11
Prohibition of disguised expulsion

Austria

[Original: English]

Referring back to its comments on draft article 2, Austria is of the opinion that expulsions can only be effected through formal governmental acts. Draft article 11 has to be modified to reflect this understanding.

Canada

[Original: English]

Article 11 (Prohibition of disguised expulsion) states that, "disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including where the State *supports or tolerates* acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory" (emphasis added). Framed as such, draft article 11 suggests a lower threshold for State responsibility where the conduct of private actors is not attributable to the State and does not amount to a breach of an international obligation. Since articles 2 and 11 both regard attributable expulsion, these provisions should incorporate the same threshold for attribution described in the draft articles on State Responsibility for Internationally Wrongful Acts.

Germany

[Original: English]

We have previously stated that in our view the scope of draft article 11 is imprecise as, in particular, the definition of "disguised expulsion" in its para. 2 could leave room for an overly broad interpretation. Therefore, we welcome the clarification in draft article 11 para 2.

However, we would like to reiterate our proposal that a further clarification be included into article 11 stipulating that acts which States undertake in accordance with their national laws and which are reasonable cannot be interpreted as actions leading to a disguised expulsion.

Netherlands

[Original: English]

With regard to draft article 11 concerning the prohibition of disguised expulsion, the Kingdom considers that the current text is unclear about the scope of this article and urges the International Law Commission not to incorporate this article as currently drafted. Moreover, the article is not in line with the Dutch principle of linking benefit entitlements to residence status. This principle was introduced in the Netherlands by the Benefit Entitlement (Residence Status) Act (*Koppelingswet*), which specifies that aliens who are not lawfully resident In the Netherlands cannot claim benefits or assistance. The idea behind the Act is that general aliens policy should aim to discourage Illegal residence in the Netherlands and that Dutch authorities must avoid facilitating illegal aliens by enabling them to obtain social security benefits and assistance. The principle of linking benefit entitlements to residence status is of the utmost importance to the Kingdom.

Republic of Korea

[Original: English]

The definition of disguised expulsion lacks clarity, and thus overly limits a State's right with regard to expulsion. Adding a proviso would give more clarity to this provision, such as: "It shall not be deemed as disguised expulsion if a State exercises its right to expel aliens in accordance with its domestic law and if the exercise of the right is reasonable".

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has significant concerns with this draft article and does not agree with it in its current form. The United Kingdom could accept amended terms should the article refer specifically to activity against those aliens lawfully present in the United Kingdom. The United Kingdom is concerned that this provision could extend to certain activity undertaken to support illegal aliens being removed, for example, support with reintegration arrangements for those who do not submit an appeal. Similarly, the use of detention, a key tool where we are seeking to establish an individual's identity or for public protection measures, could be considered "indirect actions or omissions". The article also potentially conflicts with existing and planned legislation intended to deny illegal migrants access to employment, State benefits, social housing, driving licences and financial services that is designed to deter illegal migration, promote voluntary departure by those otherwise inclined to overstay illegally, and ensure that public resources are allocated fairly only to those with a lawful entitlement to live in the country. The United Kingdom also has concern that this draft article directly contravenes the activity we are taking in respect of those subject to criminal investigation whose assets have been frozen pending conclusion of investigations. Similarly, we place restrictions on the activities of certain high-risk individuals, such as restricted leave and, independently of the individual's immigration status, terrorism prevention and investigation measures.

The United Kingdom suggests the following amendment to the text of the Article:

"1. Any form of arbitrary disguised expulsion of an alien is prohibited.

"2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, where the State supports or tolerates unlawful acts committed by its nationals or other persons with the intention of provoking the departure of aliens from its territory.

"3. A State's actions or omissions are not considered arbitrary to the extent that they relate to provisions set out in domestic law in the legitimate interests of immigration control/expelling those aliens unlawfully present."

United States of America

[Original: English]

As noted above, the United States has significant concerns about the concept of "disguised expulsion" as expressed in draft article 11. We believe that the nature and contours of "disguised expulsion" have not been sufficiently addressed and defined through existing State practice or jurisprudence for this issue to be codified as in this draft article. To the extent this draft article instead reflects a proposal for progressive development of the law, its text is unacceptably broad and ambiguous.

The commentary (see A/67/10, para. 46) cites as its primary authority the jurisprudence of the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission. As the commentary itself recognizes, there must be a "particularly high threshold" for establishing an instance of disguised expulsion, and indeed, this jurisprudence is very limited to the extent that few cases of disguised expulsion have been established. As such, important questions regarding the various elements necessary to recognize a case of disguised expulsion have yet to be thoroughly addressed by States or international tribunals.

The United States believes that draft article 11, even read with the commentary, suffers from numerous flaws in the light of this lack of clarity and consensus. For example, by using the phrase "actions or omissions," as in draft article 2, subparagraph (a), this draft article appears to be drawing on principles of State responsibility. See article 2 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts. However, because the draft article would impute State responsibility based on the actions of that State's nationals or other persons, it raises the question, especially in the context of "omissions", of what international obligations a State would have with respect to its nationals or other persons in the context of expulsions of aliens. Moreover, draft article 11 does not include a requirement of attribution to the State, although this element does appear in draft article 2, subparagraph (a), and in the commentary. In addition, the term "tolerates" is clearly overly broad in the light of the aforementioned "high threshold"; it could lead to claims of State responsibility for a wide range of actions by third parties over which it has little or no means of control. The text also does not sufficiently clarify that the critical element of intentionality applies to the State rather than to "its nationals or other persons". Finally, as noted above, this draft article uses the term "forcible departure" whereas draft article 2, subparagraph (a), uses the different phrase "compelled to leave".

Especially given the potential implications for State responsibility and a State's obligations vis à vis the conduct of its nationals, other persons and even

subnational governmental entities, a definitive articulation of the concept of "disguised expulsion" would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends that this draft article be deleted.

12. Article 13
Prohibition of the resort to expulsion in order to circumvent an extradition procedure

Canada

[Original: English]

Article 13 (Prohibition of the resort to expulsion) regards the use of expulsion to "circumvent" extradition procedures. Canada is concerned that the word "circumvent" does not adequately capture the improper purpose or bad faith standard suggested by this provision. That is, States cannot use deportation procedures for the sole purpose of avoiding an extradition process where there is not otherwise a legitimate immigration purpose. Canada would prefer the following wording: "A State shall not resort to expulsion in the absence of a legitimate immigration purpose solely to avoid extradition".

Czech Republic

[Original: English]

The Czech Republic would like to express concerns about the proposed article 13, which pertains to the prohibition of expulsion in order to circumvent an extradition procedure. Although the Czech Republic does not employ such practices, it is our position, supported by the standing decisions of the European Court of Human Rights, that, where the person subject to extradition proceedings is also an illegal immigrant, it should be the State's internal affair to decide the means employed in resolving the issue of illegal immigration.

Furthermore, the Czech Republic considers the wording of article 13 vague. It is unclear which phases of extradition procedure are comprised under the term "ongoing" as the beginning of the procedure differs in each State's legislation. It may, therefore, begin in the very instant of taking an alien into custody, at the moment of delivery of an extradition request or, in the Common Law legal system, the beginning of the procedure can also be marked by issuing the "authority to proceed." Due to variances across the existing legal systems of the world, the uncertainty remains.

United States of America

[Original: English]

The United States believes this draft article suffers from a lack of clarity on the exact harm that it seeks to prevent, especially in the light of the prerogative of States to use a range of legal mechanisms to facilitate the transfer of an individual to another State where he or she is sought for criminal proceedings.

First, the United States, for purposes of analysis, assumes that the use of the term "ongoing" means this provision would not be applicable to situations where an extradition request has not been made, nor to situations after an extradition request has been denied or otherwise resolved. However, the Commission does not provide the basis for its assertion in paragraph 1 of the commentary regarding the parameters of "ongoing", and we question whether there is an international consensus on this issue. At the very least, the title of the draft article should include the word "ongoing" to mirror the draft article's text.

More importantly, it is fundamentally unclear what conduct the Commission would view as constituting "circumvention" of an extradition procedure. As reflected in the commentary, a State might legitimately use a wide range of legal bases, including national security or immigration law violations, to justify the transfer of an individual sought by another State for criminal proceedings. Especially in the light of increasing transnational criminal activity, the United States believes it would be essential to establish an acceptably precise meaning of the concept of "circumvention" so as not to stifle or impede cooperation between and among States in this area. Ultimately, a rule on this issue would need to be clearer about the harm it is intended to prevent, and take into account more fully States' practices in this area.

The United States suggests that this draft article be revised to reflect these concerns or else be deleted.

Part three
Protection of the rights of aliens subject to expulsion

Chapter I
General provisions

13. Article 14
Obligation to respect the human dignity and human rights of aliens subject to expulsion

Canada

[Original: English]

The draft articles cannot "set out" human rights since they do not constitute a human rights agreement. Thus, Canada recommends the removal of the phrase, "including those set out in the present draft articles" in Article 14 (2).

El Salvador

[Original: Spanish]

Paragraph 1 of draft article 14 is extremely relevant within the draft articles, as it seeks to strengthen their content by enunciating various principles relating to human dignity, such as the principles of humanity, legality and due process, which should prevail at all stages of expulsion — including its execution — and not only in the decision-making stage.

The wording of paragraph 2, for its part, must be sufficiently categorical, something which the use of "are entitled to in this provision does not accomplish. This phrase would merely imply the granting of a prerogative, and not an already existing and inescapable obligation of all States, namely, respect for and a guarantee of every person's human rights.

Accordingly, El Salvador proposes substituting the phrase with one that more strongly conveys an obligation and reflects the broad recognition which the centrality of human rights has now acquired.

El Salvador proposes the following wording:

"Article 14.
Obligation to respect the human dignity and human rights of alien [persons] subject to expulsion

1. All alien [persons] subject to expulsion shall be treated [in accordance with the principles of legality, due process and humanity] and with respect for the inherent dignity of the human person at all stages ["*todas las etapas*" in Spanish] of the expulsion process.

2. [All human rights of the person subject to expulsion shall be respected], including those set out in the present draft articles."

Netherlands

[Original: English]

The first paragraph of draft article 14 refers to respect for the inherent dignity of the person as a separate human right. However, there is no clear definition of the substance of this right. The second paragraph of this article, which calls for respect for human rights in general, would afford adequate protection; it therefore renders the first paragraph redundant. Furthermore, including both draft article 14, paragraph 1, and article 18 could incorrectly suggest that the former is of added value. A further extension of the prohibition of torture or of cruel, inhuman and degrading treatment, as set out in article 18, would be unacceptable to us.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has no comments on this draft article at this stage.

However the United Kingdom has noted the European Commission statement of 1 November 2012 and the proposed amended article 14. The United Kingdom actively encourages voluntary departure, but opposes having any set period for voluntary departure. Time allowed will be considered on an individual case by case basis, for example, we have published policy on not enforcing departure when children are in the run up to important examinations.

United States of America

[Original: English]

The phrase "subject to expulsion", used in this draft article and throughout part three, is vague as to whether it only covers aliens who are actually in the process of

being expelled, or all aliens who lack lawful immigration status or who otherwise could potentially be placed in removal proceedings. Based on the context of this section, and earlier versions of these draft articles, it appears that the former meaning is the one intended; however, the meaning of this phrase should be clarified in the commentary.

14. Article 15
Obligation not to discriminate

Canada

[Original: English]

Canada recommends that the grounds for discrimination listed in article 15 (Obligation not to discriminate) include sexual orientation.

El Salvador

[Original: Spanish]

Since article 15 guarantees a human right, it should not begin by recognizing a right of the State, as that could lead to misinterpretations.

In addition, the language of paragraph 2 must be more specific and more binding, as it has been widely recognized in international law that non-discrimination is a *jus cogens* principle that applies to all human rights.

Hence, the Inter-American Court of Human Rights, in its Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, states that: "the principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons."[5]

In view of the foregoing, El Salvador proposes the following wording:

"Article 15
Obligation not to discriminate

1. The State [shall not carry out any expulsion of alien persons on discriminatory grounds], in particular on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

[5] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, requested by the United Mexican States, para. 100.

2. [Any person subject to expulsion shall enjoy his or her human rights without discrimination]."

Netherlands

[Original: English]

With respect to draft article 15 (1), the Kingdom suggests to include "sexual orientation" as a separate non-discrimination ground, as was previously proposed by the European Union. Alternatively, the explanatory text of this paragraph should emphasize that this aspect is covered by the ground "sex" as it is interpreted by the United Nations Human Rights Committee.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom does not agree with this Article.

The United Kingdom supports the objective of eliminating unlawful discrimination, but has significant concerns with this draft article which is contrary to existing domestic legislation and practice. The United Kingdom Equality Act 2010, Schedule 3, paragraph 17, permits discrimination on nationality, ethnic or national origins for immigration functions, where a relevant authorization is in place. The United Kingdom must be able to prioritize enforcement action against groups illegally in the country who present a particular threat to our immigration system, including directing immigration enforcement resources towards particular groups at different times on the basis of intelligence or statistical information highlighting risks to our immigration controls.

United States of America

[Original: English]

The United States understands that, pursuant to draft article 2, subparagraph (a), these draft articles do not address a decision by a State not to admit, or deny enter to, aliens on the basis of, for example, nationality.

With respect to aliens who are present in the territory of a State, the breadth of draft article 15 is not supported by existing treaties that address expulsion or non-refoulement. While the general principle of non-discrimination does exist in human rights law, the principle is only applied to certain types of conduct by a State, not to all State conduct, and the commentary does not establish that, under existing international law, this principle applies in particular to State conduct with respect to expulsion of aliens.

Moreover, draft article 15 is clearly at tension with draft article 3, which recognizes the broad right of a State to expel an alien for any number of reasons. For example, draft article 15 would appear to prohibit a State from expelling enemy aliens in time of war, since doing so would be discrimination based on nationality, even though draft article 10, paragraph 4, appears to permit such expulsion. More broadly, United States immigration law and policy- which we believe to be consistent with similar approaches by other States- permits nationality-based classifications, so long as a rational basis exists for the classification. See, for

example, *Kandamar* v. *Gonzales*, 464 F.3d 65, 72-74 (1st Cir. 2006); *Narenji* v. *Civiletti*, 617 F.2d 745,747 (D.C. Cir. 1979).

Even the prohibition of discrimination based on "property" is problematic. For example, under United States law, certain inadmissibility grounds in 8 U.S. C. § 1182 (a), such as the public charge ground, require the Government to consider an alien's assets, resources, and financial status, in making an admissibility determination. In addition, United States law allows for admission of alien entrepreneurs on "conditional" permanent resident status, but these aliens may be removed for failure to meet the conditions of their status, including the investment of specified amounts of capital. See 8 USC§ 1186b. The prohibition under draft article 15 of discrimination based on "status" is especially problematic, given that the decision to remove an alien and the amount of process and range of potential relief from removal afforded during the expulsion process very much depend on, for example, whether the alien has been admitted to the United States or is a lawful permanent resident. These draft articles themselves discriminate among aliens on the basis of their "status", according lesser rights in some instances to aliens who are unlawfully present in the territory of a State.

Finally, especially in the light of the statement in paragraph 2 of the commentary that this provision applies "both to the decision to expel and not to expel", this draft article risks severely undermining a State's prerogative — and need, in the light of limited resources — to exercise discretion as to which expulsion cases to pursue or not pursue. Such exercises of discretion frequently involve one or more of the factors listed in this draft article, especially given the potential breadth of the term "other status".

The United States believes that this draft article is not grounded in existing international law or practice, is poorly conceived as a form of progressive development, and therefore should be deleted. If it is retained, the draft article should be focused on a particular aspect of the expulsion process where discrimination is to be avoided, such as in the accordance of procedural rights reflected in draft article 26.

15. Article 16
Vulnerable persons

Cuba

[Original: Spanish]

With regard to draft article 16 (Vulnerable persons), the concepts of "children" and "older persons" need to be defined, as these terms are imprecise and ambiguous, given that in neither case is a range of ages provided which could serve as a basis for evaluating the vulnerability of such persons.

Cuba is of the view that the protection of pregnant women provided under draft article 16 should be extended to all women and to girls, and should cover the entire expulsion process. Cuba proposes the following wording for the first paragraph: "Boys and girls, women, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall ...". The second paragraph of draft article 16 should also include a reference to girl children.

El Salvador

[Original: Spanish]

In paragraph 1, the Spanish term "*persona de edad*" is not accurate, as it could refer to any age, that is, to any of the phases into which human life is divided. In view of this problem, El Salvador proposes using the term "*adulto mayor*" to clarify the scope of this provision.

Similarly, the wording of paragraph 2 regarding the best interests of the child is confusing in the Spanish version, stemming from problems in the translation of the relevant international convention.

El Salvador recommends the following wording:

"Article 16
Vulnerable persons

Children

Children, older persons ["*los adultos mayores*" in Spanish], persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration ["*se atenderá primordialmente al interés superior del niño*" in Spanish]."

Morocco

[Original: French]

Draft article 16 (Vulnerable persons) lists the persons who fall into this category, namely children, pregnant women, older persons and persons with disabilities. Although it shows foresight by extending this protection to "other vulnerable persons" — provided that they "shall be considered as such" — the draft article raises the question of who can be considered to be a vulnerable person and according to what criteria.

United States of America

[Original: English]

The United States does provide extraordinary protections and care for children in removal proceedings, especially unaccompanied alien children. See, for example, 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C) (asylum), 1232 (screening, care, and custody); see also United States Dep't of Justice, Exec. Office for Immigration Review, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), available at www.justice.gov/eoir/efoialocij/oppm07/07-01.pdf. At the same time, in matters related to expulsion, United States law does not compel primacy of the child's "best interests". As such, the United States suggests that the term "primary" be replaced by "significant", or else that the words "a primary consideration" be replaced by "given due consideration".

Chapter II
Protection required in the expelling State

16. Article 17
Obligation to protect the right to life of an alien subject to expulsion

Austria

[Original: English]

This provision seems redundant since the duty to protect the life of an alien already results from human rights obligations.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has no comment on this draft article at this stage. However the United Kingdom would not agree to an extended interpretation of this article which would essentially provide an unqualified commitment to provide free health services to illegal migrants or an acceptance that illegal migrants with serious health problems can rely on their continued need for medical treatment as a basis for remaining in the United Kingdom in violation of our immigration laws.

United States of America

[Original: English]

Given the location of draft article 17 in part three, chapter II, the United States understands that this draft article is focused on the protection of the alien while he or she is in the expelling State, whereas issues relating to the treatment of the alien in the State of destination are addressed in part three, chapter III.

17. Article 18
Prohibition of torture or cruel, inhuman or degrading treatment or punishment

Austria

[Original: English]

Draft article 18 might lead to the conclusion that other human rights than those mentioned here do not apply.

18. Article 19
Detention conditions of an alien subject to expulsion

Austria

[Original: English]

In draft article 19, paragraph 3 (b), the wording should be made clearer in order to reflect the view expressed in the commentary that detention is lawful as long as there is a reasonable perspective towards the possibility of an expulsion, for example, during the period of examination of the alien's nationality or the issuing of travel documents for the alien.

Belgium

[Original: French]

Belgium proposes that the phrase "or a person authorized to exercise judicial power" be amended to read "or a person authorized to exercise judicial or administrative power".

Article 7, paragraphs 4 and 5, of the Act of 15 December 1980 on access to the territory, stay and establishment therein, and expulsion therefrom, of aliens, provides that the Minister or his representative may extend the detention of an alien. Such a decision shall be subject to appeal before the *Chambre du Conseil* (pre-trial court) (article 72 of the aforementioned Act).

Canada

[Original: English]

In article 19 (Detention conditions), Canada is concerned about the obligation to detain aliens subject to expulsion separately from incarcerated persons, except under "exceptional circumstances". As separation of these two groups is occasionally unfeasible, Canada would prefer that article 19, paragraph 1 (b) stipulate, "*When possible*, an alien subject to expulsion should be detained separately from persons sentenced to penalties involving deprivation of liberty" (emphasis added).

Canada agrees that the duration of detention should not be unrestricted or excessive. For greater certainty, Canada suggests that article 19, paragraph 2 (a) prohibit "indefinite" detention rather than "excessive" detention. Similarly, detention review should be conducted on defined or prescribed intervals, rather than restricted to "regular" intervals. Canada prefers that article 19, paragraph 3 (a) reflect this language.

Furthermore, article 19, paragraph 2 (b) should not restrict detention decisions to courts only. Administrative decision-makers have the power to extend the duration of detention under Canadian legislation. Thus, such decisions are not exclusively taken by a "court or person authorized to exercise judicial power." Canada suggests that article 19, paragraph 2 (b) include "judicial *or quasi-judicial* decision-making power" (emphasis added).

Cuba

[Original: Spanish]

Draft article 19.1, paragraph (b), states that an alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty. In this connection, Cuba believes that they should not only be separated from convicted criminals, but also from people who are held in custody as a precautionary measure for alleged crimes.

El Salvador

[Original: Spanish]

The Republic of El Salvador continues to note with great concern that article 19 as currently drafted seems to accept the detention of the person subject to expulsion as a general rule, and not an exceptional measure, which, in practice, could have the effect of encouraging acts which violate such basic human rights as liberty, integrity and the presumption of innocence.

In this context, it should be recalled that international human rights treaties, as well as the domestic legislation of most States, establish the obligation to guarantee every person the enjoyment of his or her right to liberty.[6] The draft articles should therefore apply this norm with a view to preventing any arbitrary detention of aliens,[7] both during the conventional expulsion procedure and with respect to any practice that potentially or materially threatens the alien's movement, which could occur, for example, in transit and identification facilities, detention centres and various types of internment facilities.

Particularly enlightening in this connection is the resolution adopted by the Inter-American Commission on Human Rights, entitled "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", which recognizes the fundamental right of all persons deprived of liberty to humane treatment, and to have their dignity, as well as their life, and their physical, mental, and moral integrity respected and ensured.

The resolution in question construes deprivation of liberty as "any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or

[6] Thus, article 9 of the International Covenant on Civil and Political Rights states that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The American Convention on Human Rights, for its part, reiterates that right at the regional level, by stating — in its article 7 — that "every person has the right to personal liberty and security. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto [...]."

[7] In this regard, the Human Rights Committee of the United Nations has interpreted article 10 of the International Covenant on Civil and Political Rights, which states that "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (General Comment No. 21 on article 10 (forty-fourth session, 1992, para. 4).

under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offences. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as [...] centres for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty."

Nor does El Salvador sees any reason whatsoever for the Commission's decision to include rights such as life, personal integrity, the right to family life or the right of equality in the draft articles while manifestly excluding recognition of the personal liberty of a person subject to expulsion, despite the fact that it constitutes a fundamental right in such processes.

In view of the foregoing, El Salvador suggests the addition of a first paragraph expressly indicating that liberty must be regarded as a general rule and that detention is a strictly exceptional and provisional measure, as set out below:

"Article 19
Detention conditions of an alien subject to expulsion

1. [(a) The expelling State shall respect and guarantee the personal liberty of the person subject to expulsion. Detention shall be applicable only in accordance with the principles of exceptionality and provisionality.]

(b) The detention of an alien [person] subject to expulsion shall not be punitive in nature.

(c) [When an alien person subject to expulsion is provisionally detained], that person shall be detained separately from persons sentenced to penalties involving deprivation of liberty ["*esta deberá permanecer separada de las personas condenadas a penas privativas de libertad*" in Spanish].

2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power and [within a specified period of time.]

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law. [The person detained subject to expulsion shall be entitled to request a review of the detention measure at any time during the process].

(b) Detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the [person subject to expulsion]."

Germany

[Original: English]

Draft article 19, paragraph 1 (b), prescribes the detention conditions of an alien subject to expulsion. In our view, the commentary (see A/67/10, para. 46) should generalize the requirement that aliens should be detained separately from criminal detainees and should not prescribe concrete measures to attain that goal. In particular, the term "separate section" as used in the commentary might be difficult to apply in practice.

Netherlands

[Original: English]

With regard to subparagraph 1 (a), the Kingdom notes that in the Netherlands the detention of aliens subject to expulsion is not punitive in nature. However, in cases in which all administrative measures (including detention) with a view to preparing and carrying out removal have failed and the alien still remains on the territory of the Netherlands without justified grounds, the case law of the Court of Justice of the European Union allows punitive measures to be taken (*Achughbabian*, C-329/11). Punitive measures ought to remain possible as a last resort for exerting pressure and as such they do not infringe human rights, provided that they are applied proportionately. The current drafting does not take this sufficiently into account.

Regarding article 19, paragraph 2 (b), the Kingdom suggests adding "or by an administrative authority, whose decision is subjected to an effective judicial review" to the end of this article, as was also proposed by the European Union. This addition is essential to States, such as the Netherlands, in which aliens law falls completely within the sphere of administrative law.

The Kingdom objects to subparagraph 3 (a) because it is too detailed to be complied with in the diverse legal systems of the different countries. For instance, in the Netherlands, aliens detention is reviewed after the imposition of the detention order and six months thereafter, and at the request of the alien. It is sufficient if the alien has the possibility of having his/her aliens detention reviewed regularly by an independent court. Furthermore, the Kingdom is concerned about subparagraph 3 (b) of this provision. The phrase "except where the reasons are attributable to the alien concerned" seems to indicate that detention could last indefinitely. It also appears that the alien is being held for failure to comply with an order in order to compel him/her to cooperate with the expulsion. Further elaboration is needed with a view to providing legal protection for the alien.

Republic of Korea

[Original: English]

Under the "Immigration Control Act" of the Republic of Korea, the extension of the duration of the detention is decided by the head of immigration offices or branch offices or by the head of custody facilities for foreigners. In this respect, the scope of persons authorized to decide on the expulsion of aliens should be expanded to include those persons.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has significant concerns with this draft article and suggests amendments.

Article 19, paragraph 1 (a) is acceptable to the United Kingdom. However, article 19, paragraph 1 (b) is unacceptable to the United Kingdom in its entirety. Those time-served Foreign National Offenders who are to remain in prison as immigration detainees at the end of their sentence are, although treated as unconvicted (i.e. remand) prisoners, held in the same prison accommodation as prisoners serving sentences. There will be no separation between the two categories within the particular prison. The same position would also apply to immigration detainees transferred from Immigration Removal Centres to prisons for security/control reasons.

Similarly, articles 19(2)(a) and (b) in their current form are not acceptable to the United Kingdom for the following reasons. The United Kingdom does not accept that international law imposes a set maximum time limit or fixed period of authorization for detention. The United Kingdom also considers that the proposed prohibition of "detention of excessive duration" is unacceptably vague. The period of detention is still subject to strict restrictions in law, namely the United Kingdom common law and article 5 of the European Convention on Human Rights. The practice in the United Kingdom is to maintain detention while there is a realistic prospect of return and within a reasonable period of time, although the latter will depend on all the circumstances of the case, for example, the threat posed and risk of absconding by the individual concerned and, in some instances, seeking assurances from other States as to the position of the individual on return. The proposed introduction of judicial authority to authorize continued detention is unacceptable and out of step with domestic legislation, which is compliant with the European Convention on Human Rights article 5 and is operated in line with established legal principles. The key is that administrative detention is prescribed by law and subject to judicial review.

The United Kingdom proposes that the draft article be amended as follows:

"(2)(a) The duration of the detention shall not be arbitrary. It shall be limited only for such period of time as is reasonable in all the circumstances for the expulsion to be carried out, as prescribed by law.

"(2)(b) The extension of the duration of the detention may be decided upon only by a court, or a person authorized to exercise such power in law, subject to judicial review."

While article 19, paragraph 3 (a) is acceptable to the United Kingdom, it considers that it is necessary to amend article 19, paragraph 3 (b),to bring the wording of this sub-paragraph into line with article 19, paragraph 2 (a), as follows:

"(3)(b) Subject to paragraph 2, detention shall end when the expulsion cannot be carried out within a reasonable period of time, except where the reasons for delay are attributable to the alien concerned."

United States of America

[Original: English]

The United States believes that the standards in draft article 19 are generally reasonable, although we would propose some modifications. As a general matter, the United States is committed to safe, humane and appropriate detention of individuals when their detention is necessary for reasons relating to their removal from the United States. The Department of Homeland Security is charged with managing the detention of aliens (other than unaccompanied alien children) who are subject to expulsion, including the conditions of detention, access to legal representation, and safe and secure operations across its detention facilities nationwide. If an alien, through the administrative process, is found to be in violation of the immigration laws of the United States and subject to a final removal order, he or she may be detained until removed, which generally should occur within 90 days of the final completion of the administrative process. See 8 U.S.C. § 1231 (a)(l)(A), (2). Post-order detention of such aliens for 180 days, however, is presumptively reasonable. *Zadvydas* v. *Davis*, 533 U.S. 678,701 (2001).

In draft article 19, paragraph 1 (a), the words "for this reason alone" should be inserted after "not" to account for aliens subject to expulsion who are concurrently being incarcerated punitively as criminals.

The United States finds the language of draft article 19, paragraph 1 (b) unclear, i.e. whether it is intended to preclude aliens subject to immigration detention from being detained in criminal detention facilities, or to require separation of noncriminal aliens and criminal aliens in an immigration detention facility. The commentary (see A/67/10, para. 46) states that aliens may be detained in criminal facilities and that noncriminal aliens subject to expulsion may be detained in the same facility as criminal aliens subject to expulsion. This provision should be revised to be more specifically tailored to the harm that it is seeking to prevent and make clear that aliens detained for the purpose of removal, whether criminal aliens or noncriminal aliens, may be detained in the same facilities as individuals detained under the criminal laws of the State.

With respect to draft article 19, paragraph 2 (b), not all extensions of immigration detention need be decided by a judicial authority, especially if they are short-term. Under United States law, for example, the Executive Office for Immigration Review in the United States Department of Justice reviews custody determinations in certain situations, such as for persons who are not subject to mandatory detention. See 8 U.S. C.§ 1226; 8 C.F.R. § 1003.19. Accordingly, the United States recommends either changing "judicial" to "such," or else replacing the phrase "may be decided upon only" with "must be reviewable by." If necessary, an additional sentence might be added along the lines of: "Prolonged detention after the alien has been ordered removed shall be subject to judicial review."

United States law permits continued detention of removable aliens in "special circumstances" (for example, highly contagious disease, terrorism or other security concerns, special danger to the public). See 8 C.F.R. § 241.14; see also 8 U.S.C. § 1226A. Accordingly, the United States urges that in 19(1)(b) and 19(2)(a), the word "generally" be inserted after "shall," and in 19(3)(b), the clause "or is necessary on grounds of national security or public order" be inserted at the end of this provision.

19. Article 20
Obligation to respect the right to family life

Australia

[Original: English]

Australia notes that a number of the draft articles are taken from regional instruments rather than universal instruments. For example, the obligation to respect the right to family life in draft article 20 uses the language of the European Convention on Human Rights rather than "arbitrary or unlawful interference" with family under article 17 of the International Covenant on Civil and Political Rights. Australia recommends that the draft articles be amended to better reflect the rights and obligations contained in universal instruments. This would enable greater clarity of international law.

Canada

[Original: English]

Canada respects the importance of the family unit, as enshrined in its commitments under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. However, "right to family life" as articulated in article 20 (Obligation to respect the right to family life) merits clarification. Canada maintains that a State may expel an alien in situations which would interfere with the right to the protection of family life. Further, Canada notes that this is an unsettled area of law. Caution should be taken not to overstate the limitation on the right of States to remove aliens. The prohibition of interference with family life, "on the basis of a fair balance between the interests of the State and the alien", gives undue deference to the alien's right. This article should reflect the entitlement of a State to expel aliens who are serious criminals or who pose a serious risk to public safety or national security.

Cuba

[Original: Spanish]

Cuba believes that what is meant by "family life" in draft article 20 should be defined, given the impact that this expression has on the application of the draft article.

El Salvador

[Original: Spanish]

Paragraph 2 of draft article 20 establishes two cumulative conditions on which the State may interfere with the right to family life of a person subject to expulsion, namely: (1) that the restriction is provided by law, and (2) that a fair balance is maintained between the interests of the State and those of the alien in question.

El Salvador objects to the framing of the second requirement, since the requirement set out in the convention on which it is based has been considerably telescoped. It should be pointed out that article 8.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms cites not only the

balance of interests between the State and the alien but also what is necessary in a democratic society and other relevant considerations, as set out below:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

With regard to the content of this article, the European Court of Human Rights has analysed, from a jurisprudence perspective, the validity of the restriction of the right in respect of three requirements: whether the interference was in accordance with the law, whether it was motivated by a legitimate aim and whether it was necessary in a democratic society.[8]

Thus, in comparing the provisions of the European Convention with the wording of the draft articles on expulsion, it becomes apparent that the scope of the draft articles is overly narrow with regard to the requirements for permitting a restriction of the right to family life.

Another factor to be taken into consideration is that the jurisprudence of the European Court has addressed only the conflict of interests in those cases where the person subject to expulsion has committed a crime, as in the cases of *Boughanemi, Bouchelkia, Boujlifa and Ezzouhdi v. France*. It was in that context that the Court stated it would consider, among other things, the nature and seriousness of the offence committed by the applicant, the duration of the applicant's stay in the country, the time which has elapsed since the commission of the offence, and whether the spouse knew about the commission of the offence.[9]

Analysing the fairness of this balance in respect of all aliens as a general rule would therefore invite criticism. Furthermore, considering that most aliens subject to an expulsion procedure have not committed any crime whatsoever, it is extremely important for the International Law Commission to clarify that, in cases of mere administrative violations of immigration regulations, requiring a balance between family life and security as an interest of the State would be inappropriate, provided that such individuals do not constitute a threat to the public order.

In view of the foregoing, El Salvador suggests rethinking the basis for the phrasing in question, in accordance with the jurisprudence of the human rights courts, as follows:

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[8] Boultif v. Switzerland, Judgment (Merits and Satisfaction), 2 August 2001, Application No. 54273/00, paras. 40 and 41: In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant's residence permit in Switzerland interfered with the applicant's right to respect for his family life within the meaning of Article 8 § 1 of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was "in accordance with the law", motivated by one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society".

[9] Ibid., para. 48.

"Article 20
Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of an alien person subject to expulsion.

2. The expelling State shall not interfere with the exercise of the right to family life except where provided by law and [where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others]."

Republic of Korea

[Original: English]

The definitions of "family" and "right to family life" in this article are unclear, which may lead to the invalidation of a State's decision on expulsion. As such, it would be better to provide definitions for these terms.

United States of America

[Original: English]

As a threshold matter, the United States does not believe that draft article 20 properly belongs in part three, chapter II, given that the title of the chapter and the substance of the other draft articles in this chapter address standards related to the treatment of an alien subject to expulsion rather than standards related to the grounds of expulsion. draft article 20, however, by its plain text and as noted in the commentary, addresses the right to family life as it relates both to the treatment of an alien subject to expulsion and to the grounds of expulsion. This dual purpose risks conceptually blurring the scope of the other draft articles in part three, chapter II, which is of particular concern to the United States with respect to draft article 17, per our comments above. Accordingly, draft article 20 would be more appropriately placed following draft article 15 in part three, chapter I.

Turning to the substance, an alien's family ties both inside and outside the United States are factors that are routinely considered by the United States in determining an alien's eligibility for discretionary immigration relief. See 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1182(h) (waiver of inadmissibility), and 1255 (adjustment of status to lawful permanent residence). United States immigration authorities also often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis. Yet, consideration of family unity does not always outweigh other factors in a particular case. For example, the United States may remove an alien who commits an aggravated felony in the United States regardless of his or her family ties. See, for example, *Payne-Barahona* v. *Gonzales*, 4 74 F .3d 1 (1st Cir. 2007); *Guaylupo-Moya* v. *Gonzales*, 423 F.3d 121(2d Cir. 2005).

Draft article 20, paragraph 1, reads as though the right to family life is absolute in the context of an expulsion, such that it is the paramount factor. Yet paragraph (1) of the commentary to draft article 20 indicates that the support in the legislation and case law of States is not so absolute, and instead only supports "the

need to take into account family considerations as a limiting factor in the expulsion of aliens". Consequently, draft article 20, paragraph 1, should be brought into line with the legislation and case law indicated in the commentary, by replacing "respect" with "give due consideration to".

Similarly, draft article 20, paragraph 2, should be deleted as it just largely restates the general principle of draft article 20, paragraph 1, but with more specificity, while introducing a principle of "fair balance" that is neither sufficiently grounded in existing law and practice, nor desirable as a matter of progressive development. Again, United States immigration law requires consideration of family ties in many circumstances but does not require a court or other decision-maker to "balance" those ties against the interests of the State. Especially if edited as the United States suggests, draft article 20, paragraph 1, would sufficiently express the relevant standard on this topic, making draft article 20, paragraph 2, superfluous.

Chapter III
Protection in relation to the State of destination

20. Article 21
Departure to the State of destination

Netherlands

[Original: English]

The Kingdom supports the idea of encouraging voluntary departure. It is therefore proposed that the third paragraph of article 21 be replaced with the following:

> Where there are no reasons to believe that this would undermine the purpose of an expulsion procedure, voluntary departure should be preferred over forced return and a reasonable period for voluntary departure should be granted.

This proposed amendment corresponds with the first part of the European Union's proposal. It is important that the possibility be held open of not setting a time limit for departure in some cases, for instance where a previous period time limit was disregarded.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has significant concerns with this draft article. To adopt the terms of this article would seriously undermine the approach of the United Kingdom to high risk individuals. In certain cases, for example, those who pose a threat to national security, the United Kingdom would wish to preserve the flexibility to enforce removal with the restrictions that it imposes to ensure such individuals could not lawfully return to the United Kingdom. This flexibility would be lost if we were required to facilitate voluntary departure. The United Kingdom does not consider that there is a clear basis for this draft article in existing international law, and could not support a proposal for progressive development in this respect.

United States of America

[Original: English]

Draft article 21, paragraph 1, provides that an "expelling State shall take *appropriate* measures to facilitate the voluntary departure of an alien subject to expulsion" (emphasis added). United States law provides appropriate measures to facilitate the voluntary departure of aliens in administrative removal procedures. See, for example, 8 U.S.C. § 1225(a)(4) (permission to withdraw application for admission), 1229c (voluntary departure). However, the United States reads "appropriate measures" to permit reasonable limitations on the availability of such discretionary relief. In other words, there will be circumstances where voluntary departure is not appropriate and expulsion measures must be forcibly implemented, as recognized in draft article 21, paragraph 2.

21. Article 22
State of destination of aliens subject to expulsion

Austria

[Original: English]

Austria does not have any objection to the wording of this article; however, it should be made clear in the commentary that paragraph 2 does not establish a legal obligation to admit an alien. Such an obligation could only be established via bilateral or multilateral agreements.

Cuba

[Original: Spanish]

Reference is made in draft article 22 to possible destinations for the expelled alien, but paragraph 2 states that the alien" may be expelled to any State where he or she has a right of entry or stay". This matter does not need to be included in that paragraph, as it is covered in paragraph 1, which refers to "any State willing to accept him or her at the request of the expelling State, or, where appropriate, of the alien in question". Indeed, even if a State has granted an alien permission to enter or stay in its territory, it is not obliged to accept the alien again if it invokes the grounds of public order or security.

Netherlands

[Original: English]

In this draft article, the emphasis lies on the rights of aliens who return (either voluntarily or by force) and on the obligations of the expelling State. However, it is also important for receiving States to admit these aliens. As proposed by the European Union, the Kingdom therefore suggests to add the words "and readmitted by" to the first subparagraph of article 22. Consideration could also be given to adding a separate article on the obligations of receiving States with respect to readmission.

United States of America

[Original: English]

The United States believes that draft article 22, paragraph 1, appropriately focuses on the State of nationality as the primary destination country, or alternatively another State willing to accept the alien, including upon request of the alien concerned. However, in addressing other options, draft article 22, paragraph 2, fails to recognize the possibility of expelling an alien to a State of prior residence, or the State where he or she was born. Such possibilities are contemplated in the commentary to draft article 22, paragraph 2, and in the laws of many States, see, for example, 8 U.S.C. § 1231(b)(2)(E), but do not appear in the text of draft article 22, paragraph 2 itself. Moreover, depending on the circumstances, the alien may have closer family or financial ties to one State than to others, or may face a greater hardship in travelling to one State than to others, and the expelling State should have the discretion in any given case to take such factors into account. Consequently, draft article 22, paragraph 2, should be revised to read: "An alien also may be expelled to any State where he or she has a right of entry or stay, where he or she resided or was born, or, where applicable, to the State from where he or she entered the expelling State."

In addition, it is important in this context to limit the ability of successor States to bar the return of aliens born in States that no longer exist, or in territories over which sovereignty has changed since the alien departed. United States immigration law accounts for these scenarios by permitting removal to "[t]he country that had sovereignty over the alien's birthplace when the alien was born" or to "[t]he country in which the alien's birthplace is located when the alien is ordered removed". See 8 U.S. C. § 1231(b)(2)(E)(v) and (vi). The United States suggests inserting language to this effect in the text of draft article 22 or else clarifying the application of the draft article to these scenarios within the commentary.

Finally, the commentary to draft article 22 should note that an expelling State retains the right to deny an alien's request to be expelled to a particular State when the expelling State decides that sending the alien to the designated State is prejudicial to the expelling State's interests. This important principle is codified in United States immigration law. See 8 U.S.C. § 1231 (b)(2)(C)(iv).

22. Article 23
Obligation not to expel an alien to a State where his or her life or freedom would be threatened

Australia

[Original: English]

Draft article 23 as currently drafted extends the non-refoulement obligation in the Convention relating to the Status of Refugees to any person whose life or freedom is threatened on any prohibited ground, even if they are not refugees within the meaning of that convention, and also extends existing non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. We note the International Law Commission's explanation that it

considered "there is no valid reason why the list of discriminatory grounds in draft article 23 should be no less broad in scope than the list contained in draft article 15". Given the very different policy contexts for the two draft articles (specifically, *non-refoulement* and discrimination, which are two distinct concepts in international law), Australia is of the view that it would be helpful if the International Law Commission could further clarify these issues.

Canada

[Original: English]

Article 23, paragraph 1 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) would prevent expulsion to a State where the alien's *freedom* would be threatened. This is not Canada's understanding of the current scope of international law. States may expel to a situation of detention in another State. States parties to the Convention relating to the Status of Refugees may not expel to persecution on grounds named in that Convention. More generally, States may not expel to a foreseeable real and personal risk of being subjected to torture or other similarly serious violations of human rights. A State that retains the death penalty may expel to the death penalty.

[See also the comment under article 6.]

Netherlands

[Original: English]

The Kingdom supports the possibility of allowing expulsion to go ahead where diplomatic assurances have been given that the death penalty will not be carried out. The Kingdom supports the European Union's additions to the draft in this connection.

Republic of Korea

[Original: English]

Refugees are those who need to be specially protected by the international community based on their status. Despite the need for the special protection, in comparison with article 6, paragraph 3, of the draft, article 23 gives more protection to aliens who are not refugees. Article 23.1 should thus include the same proviso with article 6, paragraph 3, as such: "... unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

[See also the comment made above under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has concern with article 23, paragraph 1, as drafted. As currently drafted the text broadly reflects article 33, paragraph 1, of the Convention relating to the Status of Refugees, which protects those who have refugee status but does apply to all aliens and as such would be a development. The United Kingdom

considers that the draft article would benefit from clarity on the level of threat which would prohibit expulsion and suggests that the risk to life be separated from the risk to freedom.

The United Kingdom suggests the following amendment to the text of the Article:

> 1. No alien shall be expelled to a State where there would be a real risk to his or her life, for example on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

United States of America

[Original: English]

Draft article 23 purports to recognize what would be a dramatic expansion of the non-refoulement provisions in existing human rights treaties, in a manner that discards the language carefully crafted by States for those regimes. As such, this draft article should be deleted or at least significantly redrafted.

Draft article 23, paragraph 1, purports to correspond "to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*)" (see A/67/10, para. 46, commentary to article 23, para. (1)). Yet draft article 23, paragraph 1, dramatically departs from the text of article 33 of the Convention relating to the Status of Refugees (Refugee Convention), as well as the settled and widely-adhered-to State practice associated with article 33 over the past 60 years.

Article 33, paragraph 1, of the Refugee Convention prohibits expulsion of a refugee "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". By contrast, draft article 23, paragraph 1, would expand the provision to prevent expulsion where life or freedom is threatened on *any* ground, "such as" the additional categories of colour, sex, language, non-political opinion, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. Moreover, the category of "membership of a particular social group" was also not expressly included; to the extent that "social origin" is intended as a replacement it does not clearly have the same meaning.

The commentary provides no basis in national legislation, national case law, international case law, or treaty law for such changes. In fact, most national laws on expulsion, deportation, or removal focus on five enumerated groups of individuals who fear persecution or have suffered persecution, specifically on account of race, religion, nationality, membership of a particular social group, or political opinion. See, for example, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). The only explanation provided in the commentary is that article 2, paragraph 1, of the International Covenant on Civil and Political Rights contains such categories, with the implication that article 2, paragraph 1, applies to a State's obligations under article 13 of the International Covenant with respect to expulsion. Yet, while these non-discrimination principles may be relevant to the treatment of aliens within a State and the process afforded aliens during expulsion proceedings, they would not all be relevant in determining whether non-refoulement obligations would preclude expulsion.

Another significant departure from settled and widely-adhered-to State practice concerns the selective incorporation of the non-refoulement-related provisions in the Refugee Convention. Draft article 23, paragraph 1, does not "correspond" to the content of article 33 of the Refugee Convention since it does not incorporate the substance of article 33, paragraph 2, which reads:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Similarly, the draft article does not account for the exclusion grounds contained in article 1 (F) of the Refugee Convention. The commentary provides no explanation for why these provisions, which have fully operated as a part of State practice in the field of refugee law for the past 60 years, should be discarded.

The United States recommends that draft article 23, paragraph 1, be deleted or else redrafted to follow the language of article 33 of the Refugee Convention.

The United States also has concerns regarding draft article 23, paragraph 2, which would purport to recognize another significant non-refoulement obligation that does not currently exist under international law. The commentary does not sufficiently establish that the core principle underpinning this provision is grounded in existing jurisprudence and State practice, other than by citing to a single Human Rights Committee decision on an individual communication. There are principled reasons to question the Committee's conclusion that a State that has voluntarily abolished the death penalty when not obligated to do so under international law nonetheless thereby assumes an international legal obligation not to expel an alien to a State that has lawfully sentenced that alien to death. Moreover, as the commentary admits, draft article 23, paragraph 2, goes further than even this limited precedent by (1) expanding this principle to States that have not even formally abolished the death penalty and (2) expanding the non-refoulement obligation to circumstances in which the individual has not yet been sentenced to death. Such extensions only further erode the grounding of draft article 23, paragraph 2, in law or principle.

While this provision would not restrict the United States' right, prerogative or authority to expel aliens from the United States, we have serious concerns regarding the adverse impact that such a proposed restriction would have on international cooperation with respect to law enforcement and criminal justice.

23. Article 24
Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Austria

[Original: English]

The wording of this provision differs from draft article 6 insofar as it requires "substantial grounds for believing", which is not the case in draft article 6. Austria wonders whether there is any reason for this difference.

Canada

[Original: English]

Canada agrees with the obligation not to expel an alien to a real risk of torture as described in draft article 24, as this is also contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, Canada does not agree with the expanded scope of article 24, in particular the inclusion of "degrading" treatment. This term is an overbroad interpretation of the obligation of *non-refoulement* implicit in article 7 of the International Covenant on Civil and Political Rights. It fails to capture the essence of non-refoulement, which is the obligation not to return someone to serious violations of human rights such as torture.

[See also the comment under article 6.]

Cuba

[Original: Spanish]

Cuba considers that draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment), should include the obligation to demonstrate "real risk", as the expression "where there are substantial grounds", as stipulated in the draft article, is inadequate and is liable to subjective interpretation.

Republic of Korea

[See the comment made above under general comments.]

United States of America

[Original: English]

The United States has no objection to the aspect of draft article 24 pertaining to torture to the extent this restates the non-refoulement obligation in article 3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Article 3 of the Convention against Torture provides that a person shall not be expelled "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". The United States understands that phrase to mean "if it is more likely than not" that such person would be tortured.

Draft article 24, however, would purport to expand the *non-refoulement* obligation found in the Convention against Torture so as to prevent expulsion of aliens in danger of "cruel, inhuman or degrading treatment or punishment". The primary justification for this expansion is jurisprudence of the European Court of Human Rights and a recommendation of the Committee on the Elimination of Racial Discrimination. These examples and some isolated instances of State practice are not a sufficient basis for presenting this draft article as codification of existing law; it clearly reflects an effort of progressive development.

One important substantive issue that the commentary does not address is why this new *non-refoulement* obligation should not permit any exceptions or limitations. The existing *non-refoulement* obligation in article 3 of the Convention against Torture does not allow such exceptions, which corresponds with the peremptory prohibition against torture. Cruel, inhuman or degrading treatment or punishment, however, does not rise to the level of torture and is not treated equally under the Convention against Torture. Yet neither the draft article nor the commentary considers whether a non-refoulement obligation with respect to cruel, inhuman or degrading treatment or punishment should permit exceptions on, for example, national security or criminal grounds, as is the case with respect to the non-refoulement obligation in the Refugee Convention. As the memorandum by the Secretariat notes, where States have adopted domestic laws that protect aliens against expulsion to States where they would be at risk of mistreatment, these laws frequently contain exceptions, for example, where the alien has committed certain types of criminal acts, threatens the interests of the expelling State, threatens that State's *ordre public* or national security, or has violated international law (see A/CN.4/565, para. 574).

Recognizing an unconditional *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment would raise additional issues not fully explored or addressed by the commentary. For example, uncertainty regarding what actions are encompassed by cruel, inhuman or degrading treatment or punishment would complicate States' efforts to meet effectively this non-refoulement obligation. An unconditional *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment could be used to support arguments against expelling any alien to a given country based on general conditions there, such as poor prison conditions. Moreover, whereas torture as defined in the Convention against Torture necessarily involves State action, cruel, inhuman or degrading treatment or punishment does not. Thus, States seeking to comply with this obligation would need to consider the likelihood that anyone at all in the country to which the person would be sent — regardless of their affiliation with the State — would take action against that individual that could be considered cruel, inhuman or degrading treatment or punishment.

The United States believes that such a new non-refoulement obligation with respect to cruel, inhuman or degrading treatment or punishment treatment or punishment would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends deleting this provision or else revising it to mirror the language of article 3 of the Convention against Torture.

Part four
Specific procedural rules

24. Article 26
Procedural rights of aliens subject to expulsion

Australia

[Original: English]

Draft article 26 extends a range of procedural rights to aliens who are unlawfully in the territory of a State party for more than six months. Some of these procedural rights lack a foundation in international law and significantly extend the obligation under article 13 of the International Covenant on Civil and Political Rights, placing a heavy burden on host States, particularly developing and least developed countries. The approach of the draft articles in this context also departs from the existing distinction in international law between persons who are lawfully and unlawfully in a State's territory.

Austria

[Original: English]

Regarding paragraph 1 (f), the provision of an interpreter free of charge would imply far reaching budgetary consequences. This paragraph should be deleted. Paragraph 3 on consular assistance to aliens subject to expulsion, which reflects article 36 of the Vienna Convention on Consular Relations, has to be read in the light of the latter provision as interpreted by the International Court of Justice. Unfortunately, the important clarification by the Court that article 36, paragraph 1 (b), of the Vienna Convention obliges the detaining State to inform the competent consular post upon request by the detainee and to inform the detainee of his or her right in that respect, is only reflected in paragraph 10 of the commentary (see A/67/10, para. 46), but still not in the draft article itself.

Regarding paragraph 4, the six months envisaged are too short to cover certain difficult cases and should be extended.

Belgium

[Original: French]

Belgium proposes that the following should be inserted into the commentary: It should be made clear that the right to be heard means the ability to present arguments during written or oral proceedings, either before or after a decision is taken.

Canada

[Original: English]

Canada has noted the proposal to limit certain procedural rights to aliens unlawfully in a State's territory for less than six months, as described in article 26, paragraph 4. Canada is not aware of any basis in international law that would support such a temporal limitation.

El Salvador

[Original: Spanish]

Article 26 is key to the draft articles, as procedural guarantees are the very core of any criminal or administrative expulsion procedure, irrespective of a person's immigration status.

This is because the guarantees as a whole are recognized as the appropriate normative link to ensure the effectiveness of subjective rights and, more generally, of the axiological principles which the rules uphold. In this regard, the guarantees are not merely a matter of legalism or formalism but rather of fundamental rights — including life, liberty, integrity and equality — which represent the values that are the foundation and justification of the existence of the State and their enjoyment by all constitutes the very foundation of democracy.

With respect to the content of article 26, the Republic of El Salvador notes with concern that, despite the recognition given to a significant set of guarantees which aliens subject to expulsion are entitled to enjoy, paragraph 4 still contains a reference to the application of other legislation "concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months".

This would be contrary to international human rights law, as it would invalidate the guarantees enunciated in the article and exclude from their enjoyment aliens with an irregular immigration status who had entered the territory of a State less than six months earlier.

The Republic of El Salvador finds fault, in particular, with the commentary of the International Law Commission on this paragraph, which maintains that "while some members contended that there was a hard core of procedural rights from which all aliens without exception must benefit, the Commission preferred to follow a realistic approach".[10] Such a statement is unacceptable, as the work of the Commission must have for its object the codification and progressive development of international law[11] — not the justification or the legitimization of a "reality" that is contrary to international human rights law.

In fact, it is also erroneous for the International Law Commission to regard recognition of the procedural rights of aliens with an irregular immigration status as part of "progressive development",[12] since all international human rights instruments already recognize that such rights apply to all persons irrespective of nationality.

El Salvador therefore believes that the express establishment of procedural guarantees for all aliens with an irregular status would be viable merely as a codification exercise, since the draft articles contain procedural guarantees that are

[10] A/67/10, para. 46, commentary to article 26, para. (11).

[11] Statute of the International Law Commission, article 1.1: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification".

[12] Ibid., article 15: "In the following articles, the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States [...]".

already recognized by universal and regional human rights instruments and the jurisprudence of international courts, which make no distinction in this respect.

In that connection, guarantees must not be viewed as privileges granted by the State, as they derive directly from human dignity, and should not be granted on the basis of discriminatory criteria, given that the right to equality — framed as equality before the law — constitutes a basic and general principle for all States which cannot be suspended, altered or limited under any circumstance.

Moreover, determining that a period of six months should be the benchmark for granting certain procedural guarantees would not only be unlawful for the above-mentioned reasons but would also be difficult to verify in each specific case. Worse still, aliens with an irregular status might be subjected, in the first six months, to expulsion based on the broad discretion of the State, which would result in failure to protect the individual and would represent a significant departure from the minimum requirements of the rule of law.

To accept this period of six months would also be to violate draft article 19 which prohibits all detention of excessive duration. In fact, in cases where an alien is detained, a period of six months of detention without guarantees would be excessive and manifestly discriminatory, particularly in comparison with shorter detention periods for nationals who have committed crimes.

In the case of El Salvador, for example, article 14 of the Constitution of the Republic establishes that "the judicial branch has sole authority to impose penalties. The administrative authorities may nonetheless impose penalties, by decision or by sentence, and subject to due process, for violations of laws, regulations or ordinances, consisting of imprisonment of up to five days or a fine, which may be commuted to community service".

Thus, the Salvadoran Constitution allows a detention period of no more than five days, which also applies in cases of expulsion;[13] in the event of non-compliance at any time, an alien may avail himself of remedies and procedures[14] necessary to safeguard his rights. Consequently, when compared with this internal law, the draft articles would permit an additional 170 days of detention of persons who have unlawfully entered the territory, with no possibility of guarantees, which would be highly disproportionate.

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[13] The Constitutional Chamber of the Supreme Court of Justice of El Salvador has stated in its jurisprudence that: "it must be clear that the administrative authorities may follow legal procedures for arresting an alien who has unlawfully entered the country; they may also expel him or her on those same grounds, but in no case should it be assumed that execution of an expulsion procedure authorizes the arrest of the offender for a period of more than five days for the purpose of carrying out such expulsion; exceeding that limit would be a violation of the Constitution — Article 14 — [...]" (Constitutional Chamber, Habeas Corpus Process, Ref. 19-2008, 14 May 2009).

[14] With regard to constitutional procedures, the Constitution of the Republic establishes: "Article 11, paragraph 2: A person has the right to habeas corpus when any individual or authority unlawfully or arbitrarily restricts his or her liberty. Habeas corpus may also be invoked if any authority harms the dignity or physical, psychological or moral integrity of detained persons. Article 247: All persons may seek protection before the Constitutional Chamber of the Supreme Court of Justice in respect of a violation of the rights granted under the present Constitution".

Lastly, the Republic of El Salvador deems it erroneous to establish a "without prejudice" clause to cover matters not regulated by international law. In other words, if the international community has no rule on equality with regard to the period of six months to which a "without prejudice" clause would refer, there is a risk that decisions in this regard would be left to the absolute discretion of each State.

In view of the foregoing, El Salvador reiterates that the standard of procedural guarantees to be included in the draft articles on expulsion of aliens must be internationally recognized,[15] regardless of the practice of certain States whose expulsion procedures — or lack thereof — reflect a repeated failure to comply with their human rights obligations. El Salvador therefore recommends deleting paragraph 4 from draft article 26, which would then read as follows:

"Article 26
Procedural rights of aliens subject to expulsion

1. [An alien person] subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance."

[15] The Universal Declaration of Human Rights already stipulates in its article 10 that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"; and in its article 8, that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

These provisions must, moreover, be interpreted in the light of article 2 of the Declaration by which "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The International Covenant on Civil and Political Rights, for its part, states, in its article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant".

Netherlands

[Original: English]

In the Kingdom of the Netherlands aliens have, in principle, the right to be heard by the competent authorities. However, an exception to his right is possible, if there is no reasonable doubt that the objection to the expulsion decision made by the alien is manifestly ill-founded. In the view of the Kingdom, a similar exception to subparagraph 1 (c) of draft article 26 is important in order to prevent abuse of this right.

The Kingdom would propose adding the following to the end of subparagraph 1 (d):

> , including the option to request a provisional measure in the form of an Injunction preventing the alien's expulsion pending the outcome of the proceedings.

This addition would replace article 27 (see our commentary on article 27 for further details).

Republic of Korea

[See the comment made above under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom would be content to support this article subject to the amendment of (1) (e).

The United Kingdom is not content to support the European Union's proposed amendment to article 26, paragraph 1 (a), requiring information to be provided in writing as to the available legal remedies in every case where written notice is given of an expulsion decision. The current obligations of the United Kingdom (as set out in the Immigration (Notices) Regulations 2003) only require that information be provided about the available legal remedies where a right of appeal arises. When the available effective remedy is judicial review, the relevant authorities do not provide this information. The United Kingdom considers this to be a proportionate and appropriate approach.

The United Kingdom cannot accept article 26, paragraph 1 (e), as drafted. While the United Kingdom has no objection to a person being permitted to have representation in all cases before the competent authority, the drafting of this provision is insufficiently clear and has the potential to impose an obligation on the State to secure representation for the person before the competent authority in every case.

Article 26, paragraph 1 (e), provides that a person will have a "right to be represented" before the competent authority. The commentary on this article (see A/67/10, para. 46) states that it is based on article 13 of the International Covenant on Civil and Political Rights which, it says, "gives an alien subject to expulsion the right to be represented before the competent authority". However, the wording of article 13 of the International Covenant on Civil and Political Rights itself does not express itself in terms of a right to be represented. It states that a person be "allowed

to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority". It is clear from article 13 of the International Covenant on Civil and Political Rights that the extent of the State's obligation is to permit the individual to be represented. The reference to "right" in article 26, paragraph 1 (e), creates the risk of this provision being interpreted as imposing a positive obligation to secure representation. This risk is exacerbated by the difference in wording between article 13 of the International Covenant and article 26, paragraph 1 (e), as the use of different wording, particularly where the commentary states that one article is based on the other, strongly suggests that a different result is intended.

Representation is not necessary in all cases. The necessity of representation depends on a variety of factors, including the competence of the person concerned to represent themselves, the complexity and nature of the issues to be decided by the competent authority and the type of proceedings in which the person is engaged. For example, the statutory appeals system established by part 5 of the Nationality, Immigration and Asylum Act 2002 was designed to enable access to this effective remedy without legal representation. It would be therefore disproportionate to impose an overarching requirement to secure representation for all persons before a competent authority. The securing of such representation should be determined at national level and in detailed legislation that can make provision for the variety of factors that will determine whether representation is necessary.

The United Kingdom would be content to accept article 26, paragraph 1 (e), if it were amended to make clear that a person must be permitted to be represented before a competent authority in all cases but that there is no right to be so represented.

Current legislation on immigration appeals rights is contained in the Nationality, Immigration and Asylum Act 2002. Section 82 of that Act sets out the immigration decisions which can be challenged by way of statutory appeal. These decisions include decisions to make a deportation order, and decisions to remove from the United Kingdom. There is no right of appeal against a decision to exclude a person from the United Kingdom on the ground that the presence of that person in the country is not conducive to the public good. United Kingdom legislation does not use the term "expulsion". Where there is no right of appeal, the individual has access to effective remedy by way of judicial review.

United States of America

[Original: English]

Although the United States views the procedural rights enumerated in draft article 26 as generally appropriate, we do have several concerns with the draft article as written. First, it fails to acknowledge established limitations on these procedural rights; see, for example, article 13 of the International Covenant on Civil and Political Rights ("An alien lawfully in the territory of a State party ... shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority ...") (emphasis added).

Second, draft article 26, paragraph 1 (d), uses vague and confusing terminology, especially when compared with 1 (b). Consequently, the United States

recommends that 1 (d) be redrafted to provide "the right to an appropriate and effective review process".

Third, the commentary to draft article 26, paragraph 1 (e), should clarify that the State does not have an obligation to provide such representation to the alien at the State's expense.

Fourth, draft article 26, paragraph 3, should be redrafted to reflect that this principle is an obligation of States, rather than a right of individuals, consistent with the Vienna Convention on Consular Relations. For example, it could be revised to read: "The expelling State must allow an alien subject to expulsion to seek consular assistance."

Finally, while the reference to a six-month limit in draft article 26, paragraph 4, would not conflict with United States law, this time period might appear to be arbitrary as a purported rule of international law. The standard also is likely to be difficult to administer as a practical matter; it is not always feasible to determine exactly how long an unlawful alien has been present in a State's territory. The United States recommends using more generic language here, for example, "unlawfully present in its territory for a brief duration", and then explaining in the commentary that State practice suggests that a "brief duration" generally means around six months or less.

25. Article 27
Suspensive effect of an appeal against an expulsion decision

Austria

[Original: English]

Draft article 27 cannot be accepted as it stands. It should provide for exceptions from the suspensive effect of an appeal, for example if public order or safety are at risk.

Canada

[Original: English]

Canada is unable to agree with article 27 (Suspensive effect of an appeal against an expulsion decision). Since an appeal under Canadian law does not necessarily suspend an expulsion decision. Canada would suggest, "An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State *may suspend an expulsion decision, as provided by law*" (emphasis added).

El Salvador

[Original: Spanish]

Draft article 27 provides that an appeal can have a suspensive effect only where it has been lodged by an alien with regular immigration status, which affects the right to equality before the law and could have contradictory consequences in practice.

The Republic of El Salvador is of the view that while a suspensive effect on a decision does not constitute a general rule, it should not be determined by the person's immigration status but rather should depend on the need to guarantee a right that could be irreparably violated if the decision is executed.

This is not a new proposal with regard to expulsion but rather the rule governing the adoption of precautionary measures in the context of procedural law in general. Thus, the suspension of the expulsion decision would be no more than a mechanism — implemented *ab initio* or during the process — to ensure that the final decision handed down is effective in practice.

In some expulsion procedures, owing to the huge impact which the decision could have on the individual, precautionary measures might have to be applied in a large number of cases to prevent not only the transfer of a person from one territory to another but also any consequences which such a transfer might have on the appellant's living conditions and on the exercise of other basic rights, including protection of the family, or the right to health, education, work or private property.

In view of the foregoing, it would be more pertinent in such situations to analyse the actual effects of each specific case and to maintain the alien's status quo during the appeals proceeding where an expulsion decision could have serious effects or, worse still, where those effects would be irreversible even if a decision is rendered in the person's favour.

For example, the execution of an expulsion decision against a person who has resided a number of years in the territory of the State — whether with regular or irregular immigration status — could interfere with every aspect of that person's life, which would justify a suspension of the expulsion solely for the period of the appeals proceeding and until such time as a decision is handed down. Thus — over and above the procedures relating to refugee, asylum or stateless status — consideration must be given to the large number of cases in which the expulsion decision would inevitably have an impact on the future living conditions of the individual or on his or her personal security.

Furthermore, at the international level, the tendency to grant a suspensive effect on expulsion decisions during an appeals proceeding to persons with irregular immigration status is already well-established, as directly reflected in article 22, paragraphs 2 and 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which states:

> "2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
>
> 4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion".

In view of the foregoing, El Salvador recommends the following wording:

"Article 27
Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien [person] subject to expulsion shall have a suspensive effect on the expulsion decision [where execution of the decision could cause irreparable harm or harm which would not be easily redressed by the final decision]."

Germany

[Original: English]

According to the International Law Commission commentary (see A/67/10, para. 46), article 27 constitutes progressive development. We would like to reiterate that while we support the general concept of a suspensive effect of appeals launched against expulsion decisions, we do not see a need to further develop existing laws. The reasons for a suspensive effect are aptly stated in the commentary to the respective draft article: An appeal might well be ineffective unless the execution of the expulsion decision is stayed. Our own national law — which we described in detail to the Commission in that regard — does provide suspensive effect on a broad range of appeals to administrative decisions for all the same reason. But the wording of draft article 27 leaves no room for exceptions which are necessary to ensure that it is not used to prevent a perfectly sound expulsion decision. Therefore as already stated before we support the general concept of a suspensive effect, but would propose that draft article 27 be amended to include certain exceptions. Of course, any exception has to respect every person's right to an effective remedy.

Netherlands

[Original: English]

It is of the utmost importance to the Kingdom that article 27 be deleted in its entirety. This article would make it virtually impossible to remove aliens from the territory of a State. We would also refer to the European Union's comments on this article. Recognition of a suspensive effect of an appeal lodged against an expulsion decision could indeed be seen as incitement to abuse appeal procedures to the detriment of their genuine purpose. In order to avoid removals In conflict with national or international legislation, the Kingdom proposes making the addition to article 26, paragraph 1 (d), as suggested above.

Republic of Korea

[Original: English]

This article is better to be deleted. Under the Administrative Litigation Act of Korea, execution of the expulsion decision can be suspended only upon a court decision. A simple appeal by an alien subject to expulsion should not have an effect to suspend the government decision, which can unduly limit State sovereignty.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom cannot accept this article. This constitutes an unwelcome and disproportionate development of the law.

The Immigration Bill that is currently before the United Kingdom Parliament provides for non-suspensive appeals for foreign criminals where no serious irreversible harm would result from the appeal taking place after the person has departed the United Kingdom. This approach is consistent with international law and European Court of Human Rights jurisprudence. This is acknowledged by the Commission in its analysis of *Conka v. Belgium* in paragraph (4) of the commentary to this article. It is also consistent with the judgment of the European Court of Human Rights in *De Souza Ribeiro v. France* (2012).

The United Kingdom considers that this represents the extent to which international law and European Court of Human Rights jurisprudence require an appeal to have a suspensive effect. To extend a requirement for suspensive effect to all appeals against expulsion decisions is disproportionate. Where serious irreversible harm may result from a person being required to depart prior to the appeal being concluded, it is proportionate for the appeal right to be suspensive so that the risk of such harm does not arise. However, where there is no risk of serious irreversible harm arising because an appeal does not have suspensive effect, either because the issues in question are not such as to raise the risk of serious irreversible harm or the claim is clearly unfounded, it is disproportionate and unnecessary to require a suspensive appeal in every case.

The United Kingdom notes that the Commission considers that State practice in this matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against all expulsion decisions. The United Kingdom agrees and considers that, this being the case and having regard to the United Kingdom's position, as outlined in the paragraph above, regarding the proportionality and necessity of developing the law as the Commission proposes, that the case has not been made for developing the law in this way. The United Kingdom welcomes the Commission's conclusion that a requirement for a suspensive appeal should not arise in relation to persons not lawfully present in the territory of the State in question.

This draft article cuts across existing domestic legislation under the Nationality, Immigration and Asylum Act 2002 which provides for non-suspensive appeals in certain cases. Section 94 provides for a non-suspensive appeal where the Secretary of State certifies an asylum or human rights claim as clearly unfounded. These provisions are a central part of the United Kingdom's appeal framework ensuring that unmeritorious claims cannot be used to delay departure from the United Kingdom. Where a claim is certified as clearly unfounded such that the appeal against the decision in question is non-suspensive, the certificate can be challenged by judicial review which is suspensive of removal in these cases as a matter of policy.

United States of America

[Original: English]

In line with the concerns expressed by several other countries, the United States does not think that this draft article reflects current State practice, and is not well crafted as a purported role of international law. First, it is overly broad to the extent it could be read to apply to every kind of appeal lodged by an alien during expulsion proceedings. Under United States immigration law, an alien subject to a final order of removal generally has the potential for several levels of appeal,

although there are some exceptions, for example, expedited removal procedures under 8 U.S. C. §1225(b). A direct appeal of the removal order to the Board of Immigration Appeals has an automatic suspensive effect; further appeals would need to be accompanied by a separate request for a stay pending appeal.

The United States believes that draft article 26, paragraph 1, which describes a right to challenge the expulsion decision through an effective review process, adequately and appropriately addresses the underlying concern motivating this draft article. States should have flexibility, within the context of their particular immigration systems and review processes, to determine whether particular kinds of petitions or appeals should have automatic suspensive effect or should allow for discretionary stays, as long as aliens ultimately have access to an effective review process. This draft article does not take into account the reasonable variations among States' practices on this issue.

The United States believes this draft article should be redrafted to address these concerns or else deleted.

26. Article 28
Procedures for individual recourse

Cuba

[Original: Spanish]

We suggest that, in draft article 28, it should be made clear, from a *ratione materiae* and *ratione personae* standpoint, which international body would be competent to determine whether the grounds for expulsion listed in draft article 5 existed or not. The draft article should also specify whether the competent international body shall be one recognized by the expelling State or by the expelled person.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has no concerns with this draft article. However, as individual recourse to a competent international body is used as an argument to suspend the implementation of expulsion decisions as an interim measure, the United Kingdom requests that the Commission have regard to its comments about article 27 on the extent to which a challenge to expulsion should be suspensive where there is no risk of serious irreversible harm if the remedy is pursued and concluded after expulsion.

United States of America

[Original: English]

Especially given the wording of the phrase "any available procedure", the United States understands this provision to recognize only an obligation by a State to permit aliens subject to expulsion to pursue individual recourse to a competent international body where such a procedure is already generally available within, or with respect to, that State.

Part five
Legal consequences of expulsion

27. Article 29
Readmission to the expelling State

Australia

[Original: English]

Australia notes that a number of the draft articles would benefit from further precision or clarification. For example, Australia notes that draft article 29, paragraph 1, is unclear as to what bodies the International Law Commission regards as "competent authorities" and would appreciate clarification to ensure that this refers to a competent authority in the expelling State. Without further clarification on this point Australia is not in a position to form a view as to whether this draft article is consistent with existing international law.

Canada

[Original: English]

In international law, aliens have no *right* of admission to a State. Aliens who are removed are not entitled to readmission. Canada cannot agree with article 29 on the right to readmission should an alien's removal be later established as unlawful. Instead, an unlawful expulsion decision cannot be used to prevent the alien from requesting or reapplying for admission.

Cuba

[Original: Spanish]

With regard to draft article 29, which refers to the readmission of an alien to the expelling State if the expulsion was unlawful, the Republic of Cuba believes that it should specify that the competent authority that can revoke a decision handed down by a domestic body must be a competent authority of the expelling State.

El Salvador

[Original: Spanish]

Draft article 29 establishes the possibility of readmission in cases of unlawful expulsion, which is an important provision of progressive development. In any case, since this is only one of the possible grounds for readmission, El Salvador recommends that the International Law Commission add a "without prejudice" clause to clarify that there could be other grounds for readmitting the person.

It recommends the following rewording:

"Article 29
Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save

where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

[3. The present article shall be understood without prejudice to other grounds for readmission provided for by the expelling State.]"

Germany

[Original: English]

Draft article 29 does not constitute *lex lata*. Even if perceived as a rule *de lege ferenda*, the wording seems too broad as it includes a "right of return" in every case in which it is established by a competent authority that the expulsion was unlawful.

Netherlands

[Original: English]

The words "of that State" ought to be added [after "by a competent authority"] for the sake of clarity.

Republic of Korea

[Original: English]

It is the sovereign right of a State whether to allow expelled aliens to be readmitted to its territory, even if it is established by a competent authority that the expulsion was unlawful. In this sense, article 11 of the Immigration Control Act provides restrictions on the readmission of aliens who have been expelled by the Government of the Republic of Korea. As such, this article should be deleted.

United States of America

[Original: English]

Although the United States appreciates the principles of fairness motivating this draft article, we have serious concerns to the extent it would purport to recognize an unprecedented individual "right" to be admitted by a State. In no other context does an alien possess a right to be admitted to a State; even though this draft article addresses very narrow circumstances, it would set an unacceptable precedent in this regard. The State, even in sympathetic circumstances such as those addressed by this draft article, does, and should, maintain its sovereign prerogative to determine which aliens may be allowed to enter and under what conditions. See *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("In accord with ancient principles of the international law of nation-states, ... the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers ....") (quotation marks omitted); see also H. Lauterpacht (ed.), *Oppenheim's International Law*, 8th edition (London, Longmans, Green & Co., 1955), vol. I, pp. 675-676. Moreover, by addressing admission, this draft article goes beyond the scope of the topic of "expulsion".

The United States believes this draft article should be redrafted to address these concerns or else deleted.

28. Article 30
Protection of the property of an alien subject to expulsion

Australia

[Original: English]

In Australia's experience there may be circumstances in which the draft article 30 requirement that States take appropriate measures to protect the property of an expelled alien would need to be limited on national security grounds, for example where the property has a connection to organized crime or the financing of terrorism.

Canada

[Original: English]

Article 30 (Protection of the property of an alien subject to expulsion) requires an expelling State to take "appropriate measures" to protect the property of an alien subject to expulsion. The commentary (see A/67/10, para. 46) explains the purpose of this provision is to provide a reasonable amount of time before or after expulsion to allow for the repatriation of property. The article itself should reflect this purpose.

Morocco

[Original: French]

Protection of the property of an expelled alien is a logical extension of the expulsion process set out in the draft articles, and addresses the concern to uphold the vested rights of the expelled alien. Seen in terms of private property, expulsion should not violate the vested rights of expelled persons, including the right to receive income and other benefits owed to them. In Morocco, an expelled alien's property is fully protected from confiscation, subject to the provisions of domestic legislation, including Act No. 43-05 of 17 April 2007, as consolidated in its latest version of 17 February 2011, and other instruments adopted by Morocco (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted on 16 May 2005, and the Arab Convention on Combating Money-Laundering and the Financing of Terrorism of 21 December 2010).

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has significant concerns with this draft article as currently drafted as it goes beyond the scope of those international obligations cited by the Commission in its commentary by referring to the protection of property by the State which could be interpreted as going wider than the identified mischief, i.e. arbitrary deprivation of property.

The United Kingdom allows people to take property with them on removal from the country (although they may have to pay excess baggage charges) or to make arrangements with family/friends for the shipment or disposal of their property. The United Kingdom does not, and would not, take any other measures to protect the property of aliens being expelled from the country beyond those that apply generally to all persons.

The United Kingdom suggests that article 30 be redrafted, as proposed, to specifically reflect the prevention of arbitrary deprivation of property:

> 30. The expelling State shall take appropriate measures to ensure that aliens subject to expulsion are not arbitrarily deprived of their lawfully held personal property, and shall, in accordance with the law, allow the aliens to dispose freely of their property, even from abroad.

United States of America

[Original: English]

The United States reads the term "appropriate" to afford States flexibility in the treatment of certain types of property, including property acquired by the alien through criminal means. In particular, as paragraph (4) of the commentary notes, the language "takes sufficient account of the interest that the expelling State may have in limiting or prohibiting, in accordance with its own laws, the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question or that might be the proceeds of criminal or other unlawful activities". Thus, in certain circumstances the State is entitled to take possession of the property of an alien subject to expulsion for purposes of forfeiture. Moreover, the United States reads "appropriate measures" to mean that the State is not under an absolute obligation to protect the assets of an alien subject to expulsion.

29. Article 31
Responsibility of States in cases of unlawful expulsion

Austria

[Original: English]

As Austria has already explained two years ago, both articles seem redundant as, on the one hand, there can be no doubt that any breach of an international obligation entails international responsibility and, on the other hand, that any State can exercise the right of diplomatic protection in favour of its nationals. These obligations and rights derive from other regimes of international law and need not be repeated in this context. Additionally, it is not clear which states might be entitled to invoke the responsibility of the expelling State. At least the commentary should provide clarifications in this regard.

Republic of Korea

[See the comment made above under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

To the extent that any of the draft articles represent existing international legal obligations, the United Kingdom agrees that a breach of those obligations could in principle entail the international responsibility of the expelling State.

United States of America

[Original: English]

The United States has several drafting suggestions to improve the clarity of this provision. The words "the expelling State's" should be inserted before "international obligations"; the word "under" should be replaced by "as reflected in"; the word "under" should be inserted before "any"; the word "applicable" should be inserted before "rule"; and the words "the expelling" should be replaced by "that." As edited, the draft article would read:

> The expulsion of an alien in violation of the expelling State's international obligations as reflected in the present draft articles or under any other applicable rule of international law entails the international responsibility of that State.

30. Article 32
Diplomatic protection

Austria

[See the comment under article 31.]

Germany

[Original: English]

We still propose draft article 32 to be deleted. It seems sufficient to mention diplomatic protection in the commentary.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom proposes that this draft article be reformulated as a without-prejudice article. The exercise of diplomatic protection in respect of an alien subject to expulsion would necessarily be dependent on an existing right of the relevant State to exercise diplomatic protection in respect of the subject.

United States of America

[Original: English]

The United States would emphasize that, as suggested in the commentary, nothing in this draft article is intended to alter the normal application of the general rules on diplomatic protection under international law.